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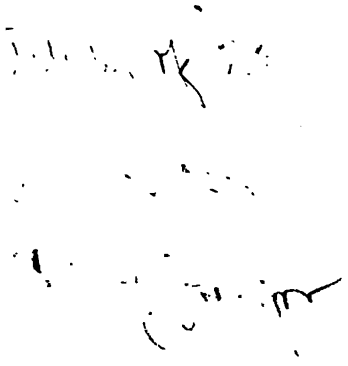

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The Massachusetts Business Corporation Law of 1903.

COVERING PRIVATE BUSINESS CORPORATIONS EXCEPTING FINANCIAL, INSURANCE AND PUBLIC SERVICE CORPORATIONS.

BY
PRESCOTT F. HALL,
OF THE SUFFOLK BAR.
Author of Massachusetts Law of Landlord and Tenant, Examination of Land Titles in Massachusetts, etc.

SECOND EDITION.

BOSTON:
WILLIAM J. NAGEL.
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PREFACE TO THE SECOND EDITION.

In this second edition, the book has been practically rewritten. Many topics are now treated fully which were omitted or treated briefly in order to make the first edition available at the earliest possible moment. Some errors have also been corrected. It is hoped that practically every decided point relating to Massachusetts business corporations is now embodied in the text. Much historical material has been included, by way of explaining earlier statutes and decisions, and has been marked as such.

To remove a confusion found by some, in the first edition, between the section numbers of the book and the section numbers of the corporation act, the former have been abandoned. The chapters are now divided by capitals, numerals, and small letters; and, in the chapter covering the Act, the numerals are the section numbers of the Act itself. Other statutes relating to corporations are inserted under the sections of the Act to which their subject matter is most nearly related.

The forms have been considerably increased in number, and have been fully indexed. The citations include volume 194 of the Reports and the legislation of 1907.

P. F. H.

60 State St., Boston, *February,* 1908.

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The Massachusetts

Business Corporation

Law of 1903.

CHAPTER I.

CORPORATION LEGISLATION IN MASSACHUSETTS.

A. History of legislation in Massachusetts.[1]

"Before 1851 no corporation could organize except by special act of the Legislature. In 1808 (chapter 65) the first legislation governing the organization and conduct of corporations so organized became law. The act is short and by no means comprehensive. It contains provisions for the election of clerk and treasurer, the adoption of by-laws, the calling of the first meeting of the organizers of the corporation, the transfer and sale of stock and the liabilities of stockholders. By chapter 53 of the Acts of 1829 the liability of stockholders which, under the Act of 1808, was practically unlimited, was confined to the debts of the corporation in excess of the amount of capital stock actually paid in. In 1833 (chapters 83 and

[1] For the history of corporate taxation, see Worcester v. Board of Appeal, 184 Mass. 460; New England, etc., S. S. Co. v. Commonwealth, 81 N. E. 286 (Mass. 1907).

49) the machinery for organization and for dissolution by appointment of a receiver, and the form of by-laws, was regulated in substantially the same language as is found in the present law. (R. L., chapter 109, sections 4, 5, 13, 15, 16, 54 and 55.)

"Chapter 133 of the Acts of 1851 marks the beginning of incorporation without a special act of the Legislature. Under the provisions of this act, incorporation under general law was permitted for the purpose of carrying on any kind of mechanical or manufacturing business or a mining or quarrying business. For the following twenty-three years, by succeeding acts of the Legislature, the purposes for which corporations could be organized under general laws were enlarged to cover the printing and publishing trades, the fishing business, the business of manufacturing and furnishing gas, steam and hot water, the business of acting as common carriers of persons or property and the business of erecting hotels and public halls. Finally, in 1874, corporations organized for any lawful purpose, except for the purpose of distilling or manufacturing intoxicating liquors, for buying and selling real estate, for banking or insurance, or for any other business prohibited by law, were permitted to incorporate under general laws, but the capitalization of each of these classes of business was arbitrarily limited. For example, no corporation could be organized for the business of printing or publishing or for the purpose of erecting hotels and public halls, with a capitalization exceeding five hundred thousand dollars. Corporations organized for the purpose of carrying on any mechanical or manufacturing business, until 1899, or to act as common carriers, or for any other lawful purpose, were limited arbitrarily in their capitalization to one million dollars.

"Few changes have been made since 1851 in the laws governing the payment in of capital stock and the liability of stockholders and directors. In 1875 (chapter 177) corporations were permitted to issue stock for property if the approval of the Commissioner of Corporations was secured as to its valuation; and the last Legislature authorized the issue of preferred stock (Acts of 1902, chapter 441). It is unneces-

sary for the committee to refer to the changes in business necessities which have taken place during the last half century. Business is not and cannot now be conducted under the limitations imposed fifty years ago. No radical and important departure, except in the two particulars noted above, has been made during the past fifty years by the Commonwealth of Massachusetts in its system of corporation laws." [2]

The present law, passed in 1903, adopts the modern view that the State owes no duty to investors to look after the solvency of corporations; and that its sole obligation is to see that creditors and stockholders shall be at all times fully informed as to the organization and management of the corporations to which it gives franchises. The present law affects all domestic business corporations except the few created by special charter on or before March 11. 1831, whose charters were not in terms made subject to alteration, amendment or repeal. It applies to all foreign corporations having a usual place of business in the Commonwealth, or engaged temporarily or permanently therein in construction work. It therefore affects practically every manufacturing and business corporation in the State.

B. Advantages of incorporation in Massachusetts.

The following are some of the reasons why those investing capital in corporate enterprise should seek incorporation in Massachusetts:

(*a*) Owing to the thorough and faithful administration of the corporation laws in Massachusetts in past years, this State has acquired a widespread and valuable reputation, and, although State supervision under the new law may be more restricted in its scope than formerly, there is every reason to believe that it will be performed with equal efficiency. Investors and the public may rely upon effective administration as heretofore, and this fact, together with the high standing of the Massachusetts courts, will make a Massachusetts charter a desirable aid to business enterprise.

[2] Report of the Committee on the Corporation Laws, 1903, p. 16.

(*b*) Owners of stock of Massachusetts corporations are not obliged to pay taxes on such stock.[3]

(*c*) None of the incorporators,[4] and none of the directors or officers, except the clerk,[5] need be residents of Massachusetts. The directors may meet outside the State.

(*d*) The list of stockholders is open for inspection only to the tax officials of the State and to stockholders.[6]

(*e*) Such classes of stock may be issued as is desired, with such preferences, voting powers, restrictions and qualifications as may be determined upon;[7] may be issued for cash, property, tangible or intangible (including good will and patents), services or expenses;[8] may be paid for by instalments,[9] and may be increased or reduced by the vote of a majority of the stock outstanding at the time of the vote.[10]

(*f*) The board of directors is the sole judge under the present act of the value of the property, etc., paid in as part of the capital.[11]

(*g*) Stockholders are subject to no personal liability for debts and contracts of the corporation, except (1) in case of illegal reduction of capital, and (2) for wages of operatives for services rendered within six months before a demand made upon the corporation.[12]

(*h*) The cost of incorporating and the annual tax compare favorably with the same items in other States.

[3] St. 1903, c. 437, § 86. Cf. R. L., c. 14, § 61.
[4] St. 1903, c. 437, § 7.
[5] Ibid., § 18. St. 1907, c. 282, § 2.
[6] Ibid., §§ 30, 81.
[7] Ibid., § 27.
[8] Ibid., § 14.
[9] Ibid., § 15.
[10] Ibid., §§ 42, 43.
[11] Ibid., § 15. Formerly, in theory at least, the Commissioner of Corporations was the sole judge of value. R. L., c. 110, § 23.
[12] St. 1903, c. 437, § 33.

CHAPTER II.

COMPARISON OF LAWS OF THE DIFFERENT STATES.

A. In general.

A detailed examination of the corporation laws of all the States would be out of place in a work like the present, but a brief comparison of the laws most resembling the Massachusetts act, in their most important provisions, may be of value. Much detailed information may be found in the Appendix to the Report of the Committee of the Corporation Laws.[1]

For the purposes of this chapter, comparison will be made with the States of Maine, New Jersey, Delaware, West Virginia and New York.

B. Who may incorporate.

In Massachusetts, Maine, New Jersey and Delaware three or more natural persons may incorporate, and none need be residents of the State.[2] In West Virginia the law is the same except that five persons are necessary.[3] In New York three or more persons may incorporate;[4] they must all be natural persons of full age, at least two-thirds of them must be citizens of the United States, and one a resident of New York.[5]

C. Capital stock.

(*a*) Minimum:

Massachusetts. — $1,000.[6]

Maine. — $1,000.[7]

New Jersey. — $2,000.[8]

[1] (1903), printed as a document by the Massachusetts Senate. See also 2 Stimson's American Statute Law.

[2] *Mass.*, St. 1903, c. 437, § 7; *Maine*, R. S., 1904, c. 47, § 6; *N. J.*, P. L. 1896, c. 185, § 6; *Delaware*, L. 1903, c. 394, § 1.

[3] Code, 1906, § 2295.

[4] L. 1903, c. 525.

[5] L. 1890, c. 563, § 4; L. 1892, c. 687, § 4.

[6] St. 1903, c. 437, § 8.

[7] R. S., 1904, c. 47, § 7.

[8] L. 1896, c. 185, § 8; L. 1898, c. 172, § 2.

Delaware. — $2,000.[9]

West Virginia. — None.

New York. — $500.[10]

(*b*) Maximum:

None in any of these States.

(*c*) Method of Payment of Capital:

Massachusetts. — Cash, property, tangible or intangible, services and expenses. Stock issued for cash may be paid for on instalments.[11]

Maine. — Cash, property or services.[12]

New Jersey. — Cash or property.[13]

Delaware. — Cash, property or services.[14]

West Virginia. — Cash or property.[15]

New York. — Cash, property or services.[16]

(*d*) Subscription or Payment as Prerequisite to Commencement of Business:

Massachusetts. — None.

Maine. — None.

New Jersey. — $1,000 (to be subscribed).[17]

Delaware. — $1,000 (to be subscribed).[18]

West Virginia. — 10% of subscribed capital (to be paid.)[19]

New York. — 10% of subscribed capital (to be paid in cash).[20] $500 to be paid in.[21] One-half total capital to be paid in within one year on pain of dissolution.[22]

[9] L. 1903, c. 374, § 5.

[10] L. 1890, c. 567, § 2; L. 1892, c. 691, § 2.

[11] St. 1903, c. 437, §§ 14, 15.

[12] R. S., 1904, c. 47, § 50.

[13] L. 1896, c. 185, § 49. As to services, see ibid., § 50, and Wetherbee v. Baker, 35 N. J. Eq. 501, 512.

[14] Const., art. 9, § 3; L. 1905, c. 155, § 1.

[15] Code, § 2253.

[16] L. 1890, c. 564, § 42; L. 1892, c. 688, § 42; L. 1901, c. 354.

[17] L. 1896, c. 185, § 8, ¶ 4.

[18] L. 1903, c. 394, § 4.

[19] Code, § 2296.

[20] L. 1890, c. 564, § 41; L. 1892, c. 688, § 41.

[21] L. 1890, c. 567, § 2; L. 1892, c. 691, § 2.

[22] L. 1890, c. 567, § 6; L. 1892, c. 691, § 5.

(*e*) Valuation of Property or Services to be Taken in Payment of Capital:

Massachusetts. — Opinion of directors.[23]

Maine. — Opinion of directors (conclusive in absence of fraud).[24]

New Jersey. — Same.[25]

Delaware. — Same.[26]

West Virginia. — At valuation agreed upon between corporation and subscriber, which is conclusive in absence of actual fraud.[27]

New York. — Opinion of directors (conclusive in absence of fraud).[28]

D. Resident officers required.

Massachusetts. — Only the clerk, who need not be a stockholder.[29]

Maine. — Same.[30]

New Jersey. — One director and an agent for service of process.[31]

Delaware. — One director, who must be a stockholder, and resident agent in charge of office.[32]

West Virginia. — Attorney for service of process.[33]

New York. — One director.[34]

E. Requirements as to books and principal office being within the State.

Massachusetts. — Records, stock and transfer books.[35]

[23] St. 1903, c. 437, § 14.
[24] R. S. 1904, c. 47, § 50. See Libby v. Tobey, 82 Me. 397.
[25] L. 1896, c. 185, § 49.
[26] L. 1905, c. 155, § 1.
[27] Code, § 2253.
[28] L. 1892, c. 688, § 42.
[29] St. 1903, c. 437, § 18.
[30] R. S., 1904, c. 47, § 20.
[31] L. 1896, c. 185; L. 1898, c. 173.
[32] L. 1903, c. 394, §§ 9, 32.
[33] Code, § 2313.
[34] L. 1901, c. 214. He must be a stockholder unless charter or by-laws provide otherwise. L. 1901, c. 354.
[35] St. 1903, c. 437, § 30.

Maine. — Records and list of stockholders; clerk's office to be within the State.[36]

New Jersey. — Transfer and stock books.[37] Office with agent upon whom process may be served.[38]

Delaware. — Duplicate stock ledger. Principal office in State.[39]

West Virginia. — None. Office may be outside State.[40]

New York. — Stock book. Principal office to be within State.[41]

F. Meeting of stockholders — Proxies.

Massachusetts. — Within the State.[42] Proxies allowed.[43]

Maine. — Within the State.[44] Proxies or general power of attorney allowed.[45]

New Jersey. — Within the State.[46] Proxies allowed.[47]

Delaware. — First meeting within the State.[48] Other meetings within the State, unless the by-laws provide otherwise.[49] Proxies allowed.[50]

West Virginia. — All meetings may be held out of State, if stockholders so vote.[51] Proxies allowed.[52]

New York. — All meetings to be within the State.[53] Proxies allowed.[54]

[36] R. S., 1904, c. 47, § 20. No penalty for failure to keep list of stockholders.

[37] L. 1896, c. 185, § 33.

[38] L. 1898, c. 173.

[39] L. 1903, c. 394, §§ 29, 32.

[40] Code, § 2312.

[41] L. 1890, c. 564, § 29; L. 1901, c. 354; L. 1890, c. 567, § 2.

[42] St. 1903, c. 437, § 20.

[43] Ibid., § 24.

[44] Miller v. Ewer, 27 Me. 509; Freeman v. Machias, etc., Co., 38 Me. 343.

[45] R. S., 1904, c. 47, § 17.

[46] L. 1896, c. 185, § 44.

[47] Ibid., §§ 17, 36.

[48] L. 1903, c. 394, § 11.

[49] Ibid., § 32.

[50] Ibid., § 17.

[51] Code, § 2312.

[52] Const., art. 4, § 11; Code, § 2273.

[53] See L. 1890, c. 563, § 3. Ormsby v. Vermont Copper Co., 56 N. Y. 623.

[54] L. 1890, c. 563, §§ 20, 21; L. 1892, c. 687, § 21.

G. Meetings of directors.

Massachusetts. — May be held anywhere.[55]

Maine. — Same.[56]

New Jersey. — May be held outside of the State, if the by-laws or charter so provide.[57]

Delaware. — May meet outside State, if by-laws so provide.[58]

West Virginia. — May be held anywhere.[59]

New York. — Within the State.[60]

H. Extent of personal liability of stockholders.

Where the statutes are silent upon the subject, stockholders are usually held liable in equity for such part of their subscriptions as are unpaid, apart from statute.

Massachusetts. — Illegal reduction of capital and wages of operatives within six months.[61]

Maine. — Unpaid subscriptions and illegal dividends.[62]

New Jersey. — Unpaid subscriptions.[63]

Delaware. — Unpaid subscriptions, illegal reduction of capital.[64]

West Virginia. — Unpaid subscriptions, illegal dividends received.[65]

New York. — Debts contracted while unpaid stock held to amount unpaid, wages of employees.[66]

[55] St. 1903, c. 437, § 25; Saltmarsh v. Spaulding, 147 Mass. 224.

[56] R. S., 1904, c. 47, § 19. Miller v. Ewer, 27 Me. 509; Freeman v. Machias, etc., Co., 38 Me. 343.

[57] L. 1896, c. 185, § 44. Cf. Hilles v. Parrish, 14 N. J. Eq. 380.

[58] L. 1903, c. 394, § 32.

[59] Code, § 2312.

[60] Ormsby v. Vermont Copper Co., 56 N. Y. 623.

[61] St. 1903, c. 437, § 33.

[62] R. S., 1904, c. 47, §§ 86-88.

[63] L. 1896, c. 185, § 21. Wetherbee v. Baker, 35 N. J. Eq. 501. Cf. L. 1896, c. 185, § 49.

[64] L. 1903, c. 394, §§ 20, 28.

[65] Const., art. 11, § 2; Code, § 2269.

[66] L. 1901, c. 354; L. 1892, c. 688, § 54.

I. Liability of directors.

Massachusetts. — Illegal issue of stock, false reports, dividends rendering the corporation insolvent, loans to directors or stockholders.[67]

Maine. — None.[68]

New Jersey. — Failure to file certificate of reduction of capital, illegal dividends.[69]

Delaware. — Failure to make certificate of payment of capital when required, in case of failure to make certificate of reduction of capital, illegal dividends, loans to officers, false reports.[70]

West Virginia. — Illegal dividends.[71]

New York. — Loans to stockholders, false reports.[72]

J. Annual reports to State.

Massachusetts. — Statement of assets and liabilities, also list of officers and directors; return of capital and property, and list of stockholders, for taxation purposes.[73]

Maine. — List of officers and directors; no statement of condition required.[74]

New Jersey. — List of officers and directors, location of office, and name of agent; no statement of condition required;[75] return of capital stock to State assessors.[76]

Delaware. — No statement of condition required; list of officers, location of principal office, and amount of capital to be returned.[77]

[67] St. 1903, c. 437, §§ 34, 35.

[68] Penalty for illegal dividends, R. S., 1904, c. 47, § 32.

[69] L. 1904, c. 143; L. 1896, c. 185, §§ 29, 30. Williams v. Boice, 38 N. J. Eq. 364; Appleton v. American Malting Co., 65 N. J. Eq. 375.

[70] L. 1903, c. 394, §§ 24, 28, 35, 36, 37.

[71] Code, § 2269.

[72] L. 1890, c. 564, §§ 25, 31; L. 1892, c. 688, §§ 25, 31.

[73] St. 1903, c. 437, §§ 45, 48.

[74] R. S., 1904, c. 47, § 26.

[75] L. 1896, c. 185, § 43.

[76] L. 1884, c. 159; P. L. 1901, p. 31.

[77] L. 1901, c. 15, § 2.

West Virginia. — Names of president and secretary, and location of principal office.[78]

New York. — Capital, assets and liabilities; names and addresses of directors and officers, name of attorney.[79]

K. Charter fees to the State.[80]

Amount of capital:

	$10,000	$50.000	$100.000	$500.000	$1,000,000
Mass.[81]	25.00	25.00	25.00	125.00	250.00
Maine[82]	10.00	50.00	50.00	50.00	100.00
N. J.[83]	25.00	25.00	25.00	100.00	200.00
Dela.[84]	10.00	10.00	10.00	50.00	100.00
W. Va.[85]	5.00	5.00	5.00	5.00	5.00
N. Y.[86]	5.00	25.00	50.00	250.00	500.00

Filing and Recording Fees:

Massachusetts.[87] — Included in above charter fee.

Maine.[88] — $15.00.

New Jersey.[89] — $10.00.

Delaware.[90] — Same as for deeds.

West Virginia. — Covered by charter fee.

New York. — Secretary $10.00 for filing, and 15 cents per folio; county clerk 6 cents for filing, and 10 cents per folio.[91]

[78] Code, § 2275.

[79] L. 1905, c. 415.

[80] For other States, see Appendix to Report of Committee on Corporation Laws (1903), pp. 264ff.

[81] St. 1907, c. 396; St. 1903, c. 437, § 88.

[82] R. S., 1904, c. 47, § 8.

[83] L. 1896, c. 185, § 114.

[84] L. 1903, c. 394, § 129; L. 1907, c. 124, § 2.

[85] Code, § 2307.

[86] L. 1906, c. 524.

[87] St. 1903, c. 437, § 88.

[88] R. S., 1904, c. 47, § 8.

[89] L. 1896, c. 185, § 114.

[90] L. 1901, c. 167, § 129. See L. 1903, c. 394, § 129; L. 1907, c. 175.

[91] L. 1892, c. 683, § 26; Code Civil Proc., § 3304.

L. Franchise tax.

Massachusetts.[92] — At usual rate of State tax (about 1.6% on value of capital stock), less value of real estate, machinery taxable property outside State and non-taxable securities subject to *maximum* of 120 per cent. of value of real estate, machinery, merchandise and taxable securities, less value of real estate, machinery, taxable property outside State and non-taxable securities, and *minimum* of one tenth of 1 per cent. of market value of capital stock at time of assessment, less amount of local tax.

Maine.[93] — Capital up to $50,000, $5.00.
Over $50,000 and not over $200,000, $10.00.
Over $200,000 and not over $500,000, $50.00.
Over $500,000 and not over $1,000,000, $75.00.
On each additional $1,000,000, $50.00.

New Jersey.[94] — On capital up to $3,000,000, one-tenth of 1%.
Over $3,000,000 and not over $5,000,000, one-twentieth of 1%.
For each additional $1,000,000, $50.00.
Manufacturing corporations having a least 50% of their capital invested in business within the State are exempt; those having less than 50% may deduct assessed value of their real and personal estate used in their business. Corporations paying mercantile license tax are exempt.

Delaware.[95] — Beginning January 1, 1908, the tax will be upon the authorized capital, for a capitalization not exceeding $25.000, $5.00; capitalization not exceeding $100,000, $10.00; capitalization not exceeding $300,000, $20.00; capitalization not exceeding $500,000, $25.00; capitalization not exceeding

[92] St. 1903, c. 437, §§ 72, 74; St. 1904, c. 261.
[93] L. 1907, c. 185; R. S., 1904, c. 8, § 18.
[94] L. 1901, c. 9.
[95] L. 1901, c. 15, § 4; L. 1907, c. 47.

$1,000,000, $50.00; for each additional million or part thereof, $25.00.

Any corporation showing by its annual report that it is not engaged in business shall pay one half the above, but not less than $5.00.

West Virginia.[96] — Resident corporations, on authorized capital:

$5,000 or less, $10.00.
Over $5,000 and not over $10,000, $15.00.
Over $10,000 and not over $25,000, $20.00.
Over $25,000 and not over $50,000, $25.00.
Over $50,000 and not over $75,000, $30.00.
Over $75,000 and not over $100,000, $35.00.
Over $100,000 and not over $125,000, $40.00.
Over $125,000 and not over $150,000, $45.00.
Over $150,000 and not over $175,000, $50.00.
Over $175,000 and not over $200,000, $55.00.
Over $200,000 and not over $300,000, $70.00.
Over $300,000 and not over $400,000, $85.00.
Over $400,000 and not over $500,000, $100.00.
Over $500,000 and not over $1,000,000, $150.00.
Over $1,000,000, $150.00 and $40 per million.

Non-resident corporations, on authorized capital:

$10,000 or less, $15.00.
Over $10,000 and not over $25,000, $20.00.
Over $25,000 and not over $50,000, $30.00.
Over $50,000 and not over $75,000, $40.00.
Over $75,000 and not over $100,000, $50.00.
Over $100,000 and not over $1,000,000, $50.00 plus 25 cents per thousand over $100,000.
Over $1,000,000 and not over $2,000,000, $275 plus 20 cents per thousand over $1,000,000.
Over $2,000,000 and not over $4,000,000, $475 plus 10 cents per thousand over $2,000,000.
Over $4,000,000, $675 plus $50 per million.

[96] Code, §§ 1048, 1050.

New York.[97] — On capital stock employed within the State:

If dividends, 6% or over, one-quarter of a mill for each 1% of dividends, levied on each dollar of stock.

If dividends less than 6%, assets do not exceed liabilities exclusive of capital stock or average price of stock below par or no dividend declared, $\frac{3}{4}$ mill for each dollar of capital employed in State.

If dividends less than 6% but assets exceed liabilities or stock sold on average at or above par, then $1\frac{1}{2}$ mills on each dollar of valuation of capital, with certain limitations.

[97] L. 1906, c. 474, § 2.

CHAPTER III.

INSTRUCTIONS FOR INCORPORATING UNDER THE ACT OF 1903.

A. In general.

The steps in the formation of a corporation are: (*a*) Preliminary meeting to determine the agreement of association; (*b*) Sending out a notice of the first meeting; (*c*) First meeting for organization; (*d*) Meeting of directors for choice of president, committees, etc.; (*e*) Submission of articles of organization to the Commissioner of Corporations, the payment of the organization and filing fees, and the filing of the articles of organization.

B. Preliminary meeting.

Three or more persons may meet to form a corporation for any lawful purpose except those enumerated in the act.[1] They should then agree upon the following matters:[2]

(*a*) Name of the corporation. Inquiry should be made, before the meeting, at the office of the commissioner of corporations, whether the intended name has been already appropriated by another corporation; or a name so similar as to be objectionable.

(*b*) Location of the principal office of the corporation in Massachusetts; or elsewhere, if the corporation is to do business wholly outside of the State.

(*c*) The purpose for which the corporation is formed and the nature of its business.

(*d*) The amount of capital stock, not less than $1,000.

(*e*) The classes of stock to be issued, the nature of the preferences and the method of voting on each class.

(*f*) The number of shares, and the par value of each, not to be less than $5.

(*g*) A list of officers and the number of directors.

(*h*) Draft of by-laws.

[1] St. 1903, c. 437, §§ 1, 7.
[2] Ibid., § 8.

(*i*) Who is to call the first meeting, unless notice waived as below.

(*j*) Time and place of first meeting.

(*k*) The articles of agreement should then be filled out and signed, and a waiver of notice of the first meeting endorsed thereon.[3]

C. Notice of first meeting for organization.[4]

If notice of the first meeting has been waived, none is necessary. Otherwise a notice must be given to each incorporator, signed either by such subscriber to the agreement of association as may be designated therein, or by a majority of the subscribers to the agreement, seven days at least before the day of meeting. The notice may be given in hand; or left at the residence; or left at the usual place of business; or deposited in the post-office, prepaid, and addressed to the residence or usual place of business of each subscriber.

A copy of the notice and an affidavit of one of the signers that it has been duly served are to be recorded in the corporation records.

D. First meeting for organization.[5]

At the time and place appointed for the meeting, the incorporators should assemble and proceed to effect an organization in the following manner: The person or one of the persons signing the notice of the meeting may call the meeting to order, or if notice is waived any incorporator may preside. Frequently the attorney is one of the incorporators, in which case it may be well for him to preside. The following matters must then be acted upon:

(*a*) Election of temporary chairman (by ballot).

(*b*) Election of temporary clerk (by ballot).

(*c*) Swearing of temporary clerk,[6] and recording of oath in the minutes of the meeting.

[3] See St. 1903, c. 437, § 9.

[4] Ibid.

[5] Ibid., §§ 10, 11.

[6] This is expressly required by § 10.

(*d*) Reading of the call for the meeting; or the waiver of notice, if notice has been waived.

(*e*) Reading of the agreement of association.

(*f*) Adoption of by-laws.

(*g*) Election, in the manner provided in the by-laws, of a treasurer, a clerk, who must be a resident of the Commonwealth,[7] not less than three directors,[8] and such other officers as the by-laws prescribe. Unless otherwise provided in the by-laws, the directors must be stockholders.[9]

(*h*) Swearing of clerk.

(*i*) Adjournment.

(*j*) Writing out and attesting, by temporary clerk, of the record of proceedings until the permanent clerk is chosen and sworn, including the record of such choice and qualification. Writing out and attesting, by clerk, of the remaining proceedings.

E. Meeting of directors.

The directors should at once meet to elect a president of the corporation, and to prescribe methods of conducting the corporations business. These matters may include the following items:

(*a*) Election of the president by ballot.[10]

(*b*) Election of additional officers, agents, general manager, committees, including an executive committee of the board of directors, if and so far as the by-laws provide for such election by the board of directors.[11] The board of directors may also appoint such executive and minor officers and sub-committees as are not specially provided for in the by-laws, and as they deem necessary for conducting the business of the corporation.

(*c*) Prescribing the duties of the various officers and agents, so far as the same are not fixed by the by-laws.

(*d*) Fixing the salaries of the same.

[7] Ibid., § 18; St. 1907, c. 282, § 2.
[8] Ibid., § 17.
[9] Ibid., § 18.
[10] Ibid., § 18.
[11] Ibid., §§ 18, 19.

(*e*) Determination of the time for holding, and the manner of calling, meetings of the directors.

(*f*) Determination of the times, places and method of payment for capital stock, in case it is not fully paid.[12]

(*g*) Approval of the bond of the treasurer.[13]

(*h*) Authorizing the treasurer to issue stock in accordance with the subscription or with the terms prescribed.

(*i*) Authorizing the treasurer to procure certificate and transfer books, and seal.

(*j*) Specifying what officers shall execute contracts on behalf of the corporation, and sign its checks and notes, unless provided in the by-laws.

(*k*) Authorizing and instructing a majority of the directors to make, sign and make oath to the articles of organization; to submit the same with the records of the meeting of the incorporators to the Commissioner of Corporations; and to pay the organization fee.

(*l*) Adjournment.

The directors should then proceed to make out, sign and swear to, the articles of organization.[14]

F. Submission of articles of organization to commissioner — Payment of fees — Filing of articles.

The clerk, or treasurer, or one of the directors, should then submit the articles of organization and the records of the first meeting to the Commissioner of Corporations, to get the certificate of his approval.[15] The Commissioner's office is in the back part of the State House, entrance opposite Ashburton Place. As soon as the approval of the Commissioner has been obtained, the organization fee should be paid. This is one-twentieth of one per cent. of the total amount of the authorized capital stock, as fixed by the articles of organization, in no case less than twenty-five dollars.[16] In practise, this fee is

[12] Ibid., §§ 15, 16.
[13] Ibid., § 13.
[14] Ibid., § 11.
[15] Ibid., § 12.
[16] Ibid., § 88; St. 1907, c. 396.

paid at the office of the Commissioner of Corporations. Thereupon the articles of organization should be filed in the office of the Secretary of the Commonwealth (which is above that of the Commissioner), and he will cause them to be recorded, and will issue a certificate of incorporation in the form provided by the act.[17]

The existence of the corporation begins as soon as the articles of organization are filed. The certificate or a certified copy, or the record of the certificate, is conclusive evidence of the existence of the corporation.[18]

[17] Ibid., § 12. In practice the articles are left with the Commissioner of Corporations, and the certificate of incorporation is usually mailed from the Secretary's office to the corporation's attorney.

[18] Ibid.

CHAPTER IV.

PROMOTION.

So many questions arise as to the rights and liabilities of promoters, and there is so little Massachusetts law on the subject, that it has been thought well to give a brief summary of the matter.

A. Definition of promoter.[1]

A promoter is one who actively engages in the formation of a corporation and in inducing other persons to become members of it. A promoter stands in a fiduciary relation to the corporation which he promotes.[2] The fact that one buys property, contemplating the formation of a corporation to take it off his hands does not make him a promoter, no matter how soon after the purchase the corporation is formed.[3] Nor does a promise to pay for property wholly or partly in stock of a corporation to be formed make one a promoter.[4]

One does not necessarily cease to be a promoter when the corporation is formed, for he may dominate it after its formation.[5]

B. Liability of promoters who have sold property to the corporation.

As promoters frequently form corporations to take over and develop property in which they are interested, it becomes important to consider in what cases they are liable in so doing.

[1] See Alger on Promoters; Conyngton on Corporate Organization; 1 Clark & Marshall, Corp., Chap. V.

[2] 1 Morawetz, Corp., 2d ed., § 545; Hayward v. Leeson, 176 Mass. 310; Old Dominion, etc., Co. v. Bigelow, 188 Mass. 319; Plaquemines, etc., Co. v. Buck, 52 N. J. Eq. 219.

[3] 23 Am. & Eng. Enc. Law 232; Gover's Case, 1 Ch. D. 182; Old Dominion, etc., Co. v. Bigelow, 188 Mass. 319, 321; Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, 118, 119; Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218, 1242, 1255, 1267, 1268; Ladywell Mining Co. v. Brookes, 35 Ch. D. 400; Lydney, etc., Ore Co. v. Bird, 33 Ch. D. 85; Re Hess Mfg. Co., 21 Ont. App. 66; Densmore Oil Co. v. Densmore, 64 Pa. St. 43.

[4] Gover's Case, 1 Ch. D. 182.

[5] Russell v. Gas Co., 184 Pa. St. 107.

In considering promoters' liability it is important to remember who it is who wishes to enforce liability. The question arises principally in three classes of cases: 1. where stock is issued wholly to the promoters, and the plaintiff is a purchaser from one of them; 2. where stock is issued partly to promoters and partly to the public and the plaintiff is one of the public; 3. where the plaintiff is the corporation itself.

It may be premised that in any case where the promoter makes a full disclosure of the facts, including the facts as to his profits in the transaction, to the person who afterwards brings an action to enforce liability, the latter is estopped.[6] And, on the other hand, where a promoter resells to a corporation of which he is an officer, he may be liable without any express misrepresentation.[7]

In any case where a promoter is liable to his fellow promoters for secret profits, the organization of the corporation is no bar to a bill in equity for an accounting.[8]

1. Where all the stock is issued to promoters, and the plaintiff is a purchaser of stock from one of them

In this case the doctrine applies that the transferee is bound by the action of his transferor, except where there has been an actual fraud upon the corporation.[9] Mere overvaluation, unless fraudulent, is not enough to make the issue of stock to the promoters open to attack.

[6] Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 372, 422; Battelle v. N. W. Cement, etc., Co., 37 Minn. 89 (1887). Cf. Milwaukee Cold Storage Co. v. Dexter, 99 Wis. 214.

[7] Old Dominion Copper, etc., Co. v. Bigelow, 188 Mass. 315, 322; New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73; Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218. See generally, See v. Untermeyer, 69 N. J. Eq. 36.

[8] Dole v. Wooldredge, 135 Mass. 140.

[9] Old Dominion, etc., Co. v. Lewisohn, 136 Fed. 915; Foster v. Seymour, 23 Fed. 65; McCracken v. Robison, 57 Fed. 375; Old Dominion, etc., Co. v. Bigelow, 188 Mass. 319, 325; Re Ambrose, etc., Mining Co., 14 Ch. D. 390; Re Postage Stamp, etc., Co., [1892] 3 Ch. 566; Battelle v. N. W. Cement, etc., Co., 37 Minn. 89; Seymour v. Spring Forest Cemetery Assoc., 144 N. Y. 333. Cf. Pittsburg Mining Co. v. Spooner, 74 Wis. 307.

In special cases of express fraudulent representations there may be an action for the deceit.

The general principle above stated applies where, at the time of the issue of stock to promoters, it was not contemplated that there should be any stock sold to the public but the scheme is subsequently modified in good faith, so that other stockholders are taken in.[10] Such a modification does not bring the transaction within the class of cases considered under 2.

2. Where stock is issued partly to promoters and partly to the public, and the plaintiff is one of the latter.

In this case the rule applies that a promoter cannot buy property and sell it to the corporation at an advanced price unless the corporation is represented by an independent board of directors.[11] Even a vote of the corporation will not make the transaction valid any more than a vote of the directors, where the corporation is in the sole control of the promoters before capital has been issued to the public.[12]

Of course, if a full disclosure of all the facts is made to intending stockholders, as by a prospectus, there can, on the general principles discussed above, be no liability. This duty of disclosure has been stated as follows, in a leading case: "It is a fraud for promoters to undertake to decide for the future stockholders in the corporation to be organized that one-third of the whole capital stock of that corporation is a fair re-

[10] Re British Seamless Paper Box Co., 17 Ch. D. 471; Old Dominion, Copper, etc., Co. v. Bigelow, 188 Mass. 315, 326.

[11] 1 Mor., Corp., 2d ed., § 546; 1 Thompson, Corp., § 457; New Sombrero Phosphate Co. v. Erlanger, 3 App. Cas. 1218; Lydney Ore Co. v. Bird, 33 Ch. D. 85; Hayward v. Leeson, 176 Mass. 310; Old Dominion Copper, etc., Co. v. Bigelow, 188 Mass. 319, 322; Gluckstein v. Barnes, [1900] A. C. 240; Re Olympia, [1898] 2 Ch. 153; Burbank v. Dennis, 101 Cal. 90; Simon v. Oil Co., 61 Pa. St. 221; Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219; See v. Untermeyer, 69 N. J. Eq. 36.

See Pittsburg Mining Co. v. Spooner, 74 Wis. 307.

[12] Old Dominion, etc., Co. v. Bigelow, 188 Mass. 319, 326; Hayward v. Leeson, 176 Mass. 310, 320; New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73; Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218; Re Olympia, [1898] 2 Ch. 153; Re British Seamless Paper Box Co., 17 Ch. D. 467, 471, 472.

muneration for their services as promoters, to issue one-third of the capital stock to themselves as such remuneration, and then to invite the public to subscribe to the stock of the corporation, without disclosing that fact to the subscribers and without getting their consent to the payment of that remuneration. . . . The persons to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters, that is to say, future stockholders. It is to the future stockholders that the promoters must make the disclosure of the remuneration which is, or is to be, paid to them, and it is the consent of the future stockholders that must be obtained to make that payment valid; if the promoters undertake to make to themselves remuneration for their services as promoters without making a full disclosure of the fact to the future stockholders, their principals, and getting their consent, they are guilty of a fraud. Promoters can make the necessary disclosure of the remuneration they stipulate for by including in the prospectus a full statement thereof; and if such a statement is not made therein, they cannot honestly take any remuneration for promoters' services, unless it is voted by the stockholders after the capital stock has been taken by the public." [13]

Where promoters are liable for secret profits, the fact that they take stock instead of cash is immaterial.[14]

3. Where the plaintiff is the corporation.

The corporation itself can generally sue to recover secret profits from a promoter where a stockholder could do so.[15] In such a case it is no defense that the person committing the fraud is also a stockholder,[16] although he will therefore share in the benefit of a recovery.

[13] Hayward v. Leeson, 176 Mass. 319, 320, per Loring, J.

[14] Hayward v. Leeson, 176 Mass. 310; Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219; See v. Untermeyer, 69 N. J. Eq. 36.

[15] See supra, 2; also Hayward v. Leeson, 176 Mass. 310; East Tennessee Land Co. v. Leeson, 178 Mass. 206.

[16] Old Dominion, etc., Co. v. Bigelow, 188 Mass. 319, 327; Hayward v.

A disclosure to the persons owning all the stock at the time of the transaction is not equivalent to a disclosure to the corporation, where there are subsequently other stockholders;[17] but, if all the stock is issued to the promoters for property, and they all know the facts, and it is not contemplated that any stock shall be issued to third persons, except as they may acquire from the original holders, the third persons are bound by the acquiescence of their vendors, and the corporation is bound by the acquiescence of all the stockholders.[18]

Where a promoter makes a misrepresentation as to the price paid by him for property sold to the corporation, the latter may ordinarily keep the property, and recover from the vendor the difference between what he paid for it and what he said he paid.[19] Or, the corporation may return the property, if it remains unchanged, and sue to recover the consideration.[20]

The same rule applies where promoters obtain stock of the corporation by fraud. In such a case, the corporation is entitled to follow the shares taken by the promoters or the proceeds thereof in the hands of the promoters, and to recover them specifically, or to recover damages for the loss thereof; allowing, however, to the promoters their legitimate expenses in organizing the corporation.[21]

Ordinarily, damages are assessed as of the time of the taking; but if the stock had no value at that time, because the

Leeson, 176 Mass. 310; New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, 118, 119.

[17] Old Dominion, etc., Co. v. Bigelow, 188 Mass. 319, 328.

[18] Old Dominion Copper, etc., Co. v. Bigelow, 188 Mass. 315, 325; Foster v. Seymour, 23 Fed. Rep. 65; McCracken v. Robison, 57 Fed. Rep. 375; Re Ambrose, etc., Mining Co., 14 Ch. D. 390; Re Postage Stamp Automatic Delivery Co., [1892] 3 Ch. 566. Cf. Old Dominion Copper Mining Co. v. Lewisohn, 136 Fed. Rep. 915.

[19] Old Dominion Copper, etc., Co. v. Bigelow, 188 Mass. 315, 320, 328; Hayward v. Leeson, 176 Mass. 310, 324; Gluckstein v. Barnes, [1900] A. C. 240; Re Olympia, [1898] 2 Ch. 153. See Parker v. Nickerson, 137 Mass. 487, 491; Land Co. v. Lewis, 101 Me. 78.

[20] Old Dominion Copper, etc., Co. v. Bigelow, 188 Mass. 315, 328; Hayward v. Leeson, 176 Mass. 310, 324; Gluckstein v. Barnes, [1900] A. C. 240; Land Co. v. Lewis, 101 Me. 78.

[21] Hayward v. Leeson, 176 Mass. 310, 322.. Cf. See v. Untermeyer, 69 N. J. Eq. 36.

corporation was not then launched, the date is the first date when the value of the stock became fixed.[22] Interest is allowed from such date.[23]

In any case, where the consideration is restored, the defendants are thereupon subrogated to the property.[24]

It seems that promoters are liable severally, *in solido,* as well as jointly;[25] and, after rescission, the corporation can recover against one of two promoters, although the title to the stock or property stood in the name of the other promoter, if he had an interest in the contract, he being dead, and his executors being foreign and not made parties.[26]

C. Liability of promoters for false representations.

One who is a promoter and is known to be such is in the position of a vendor of property. As to such a person, the rule is that representations commending property, its condition, value and the like, are to be received as mere opinions and with great allowance, and are not actionable unless containing specific material allegations of fact, or the purchaser has been induced to forbear inquiry.[27]

On the other hand, specific representations as to existing facts concerning the financial condition of a corporation, whereby one is induced to subscribe and pay for shares are actionable;[28] and such representations are not within the stat-

[22] Hayward v. Leeson, 176 Mass. 310; East Tennessee Land Co. v. Leeson, 183 Mass. 37.

[23] East Tennessee Land Co. v. Leeson, 183 Mass. 37.

[24] Old Dominion Copper,.etc., Co. v. Bigelow, 188 Mass. 315, 329.

[25] Old Dominion Copper, etc., Co. v. Bigelow, 188 Mass. 315, 329.

[26] Old Dominion Copper, etc., Co. v. Bigelow, 188 Mass. 315.

[27] Lynch v. Murphy, 171 Mass. 307 (sale of stock).

Cf. Deming v. Darling, 148 Mass. 504; Nash v. Minnesota, etc., Trust Co., 159 Mass. 437; Nash v. Minnesota, etc., Trust Co., 163 Mass. 574; Converse v. Hood, 149 Mass. 471.

A contract made by an agent in soliciting subscriptions that the franchise of a corporation shall be enjoyed in a particular manner, for the benefit of a subscriber, will not be enforced. Converse v. Hood, 149 Mass. 471.

[28] Walker v. Russell, 186 Mass. 69. Cf. Perry v. Hale, 143 Mass. 540.

ute of frauds, as the latter covers only representations resulting in the creation of a debt from the corporation to the plaintiff.[29]

D. Liability and rights of promoters on contracts made before incorporation.

Where one was employed by a number of associates to organize a corporation, the promoters were held jointly liable to him;[30] and as, in Massachusetts, the corporation cannot adopt the contract of promoters, it seems that parties contracting with promoters must look to them in every case.[31] But promoters who fail to organize a corporation are not liable as partners; for they do not intend to assume any such relation.[32]

The rights of promoters as among themselves are governed by their express agreements if any,[33] otherwise they are supposed to share expenses equally, and they have a right of contribution against each other.[34] If a promoter has no authority to bind his associates by a given contract, he is liable personally, on general principles.[35]

Promoters are, in general, the proper parties to sue on contracts made with them.[36]

E. Liability of the corporation for contracts made by promoters.

A corporation has no existence until its organization, and therefore it is not liable upon a contract made by its promoters

[29] Walker v. Russell, 186 Mass. 69. Cf. Medbury v. Watson, 6 Met. 246; Wells v. Prince, 15 Gray, 562. R. L., c. 74, § 4.

[30] Sproat v. Porter, 9 Mass. 300. See also Brightman v. Bates, 175 Mass. 105.

[31] See infra, under *E*. Cf. 1 Clark & Marshall, Corp., § 107.

[32] First National Bank of Salem v. Almy, 117 Mass. 476; Fay v. Noble, 7 Cush. 188; Trowbridge v. Scudder, 11 Cush. 83; Ward v. Brigham, 127 Mass. 24. Cf. Perry v. Hale, 143 Mass. 540.

[33] Marston v. Singapore Rattan Co., 163 Mass. 296. Cf. Babbitt v. Gibbs, 150 N. Y. 281; Ireland v. Globe, etc., Reduction Co., 20 R. I. 190.

[34] 1 Clark & Marshall, Corp., § 109.

[35] Fay v. Noble, 7 Cush. 188, 194; Ward v. Brigham, 127 Mass. 24.

[36] Abbott v. Hapgood, 158 Mass. 248.

or their agents, even though made in its name.[37] Further, "if a contract is made in the name and for the benefit of a projected corporation, the corporation after its organization cannot become a party to the contract even by adoption or ratification of it."[38]

Nevertheless, if the corporation accepts the benefit of the contract, it may be liable in an action of quasi-contract for the value of the goods or services.[39] If such acceptance is made by an officer or agent of the corporation he must have express or implied authority for so doing;[40] and the mere transfer of certain goods to the corporation when formed, by the person to whom they were furnished, does not tend to connect the corporation with the original sale.[41]

It would seem that, on principle, if the other party has accepted performance by the corporation, the latter may enforce the contract.[42]

Of course the corporation, when organized, can enter into a contract previously prepared, in the same way as it can make any new contract;[43] and a contract made by promoters may in some cases amount to an offer addressed to the corporation,

[37] Frost v. Belmont, 6 Allen, 152; Penn Match Co. v. Hapgood, 141 Mass. 145; Abbott v. Hapgood, 150 Mass. 248; Holyoke Envelope Co. v. United States Envelope Co., 182 Mass. 171; Koppel v. Massachusetts Brick Co., 192 Mass. 223.

[38] Abbott v. Hapgood, 150 Mass. 248, 252, per Knowlton, J.; Pennell v. Lathrop, 191 Mass. 357, 360; Koppel v. Massachusetts Brick Co., 192 Mass. 223; Tuttle v. Tuttle Co., 101 Me. 287. This follows the English view. In many other states the corporation, by express resolution or act, may ratify or adopt a contract made by promoters. See Ireland v. Globe Milling Co., 20 R. I. 190; Oakes v. Cattarugus Water Co., 143 N. Y. 430; Tuttle v. Tuttle Co., 101 Me. 287.

[39] Abbott v. Hapgood, 150 Mass. 248; Penn Match Co. v. Hapgood, 141 Mass. 145, 149; Robbins v. Railway Co., 100 Maine, 496. Cf. Holyoke Envelope Co. v. United States Envelope Co., 182 Mass. 171.

[40] White v. Westport Cotton Mfg. Co., 1 Pick. 215.

[41] Koppel v. Massachusetts Brick Co., 192 Mass. 223.

[42] Penn Match Co. v. Hapgood, 141 Mass. 145, 149 (dictum).

[43] Pennell v. Lothrop, 191 Mass. 357, 360; Holyoke Envelope Co. v. United States Envelope Co., 182 Mass. 171; Penn Match Co. v. Hapgood, 141 Mass. 145; Abbott v. Hapgood, 150 Mass. 248; Koppel v. Massachusetts Brick Co., 192 Mass. 223.

which can be accepted by it.[44] Such acceptance may be inferred from the acceptance by the corporation of a conveyance of property in accordance with the terms of the contract.[45]

Where promoters have already paid themselves by making excessive profits, they are entitled in an accounting to be allowed their expenses in organizing the corporation.[46]

[44] Holyoke Envelope Co. v. United States Envelope Co., 182 Mass. 171. Cf. People's Ferry Co. v. Balch, 8 Gray, 303, 311.

[45] Holyoke Envelope Co. v. United States Envelope Co., 182 Mass. 171.

[46] Hayward v. Leeson, 176 Mass. 310, 322.

CHAPTER V.

THE ACT OF 1903.

A. GENERAL PROVISIONS.

§ 1. The application of the Act.

"This act may be cited as The Business Corporation Law. It shall, except as herein otherwise provided, apply

"(a) To all corporations having a capital stock and established for the purpose of carrying on business for profit heretofore or hereafter organized under general laws of the commonwealth.

"(b) To all such corporations heretofore created under special laws of the commonwealth, except so far as its provisions are inconsistent with the provisions of any such special laws enacted before the eleventh day of March in the year eighteen hundred and thirty-one as are not subject to amendment, alteration or repeal by the general court.

"(c) To all such corporations hereafter created under special laws of the commonwealth so far as its provisions are consistent with the provisions of said special laws.

"It shall not apply to corporations organized under general or special laws of this commonwealth for the purpose of carrying on within the commonwealth the business of a bank, savings bank, co-operative bank, trust company, surety or indemnity company, safe deposit company, insurance company, railroad or street railway company, telegraph or telephone company, gas or electric light, heat or power company, canal, aqueduct or water company, cemetery or crematory company, or to any other corporations which now have or may hereafter have the right to take or condemn land or to exercise franchises in public ways granted by the commonwealth or by any county, city or town. But the provisions of this section shall not be construed to prohibit the organization of a corporation under the provisions of this act for the purpose of carrying on any lawful business outside of this commonwealth."[1]

[1] St. 1903, c. 437, § 1, cited in Tulane University v. O'Connor, 192 Mass. 428, 433.

a. Interpretation of corporation and other acts.

The constitutional provisions respecting corporations are as follows:

No corporation has "any other title to obtain advantages, or particular or exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public." [2]

"It shall be the duty of legislatures and magistrates, in all future periods of this commonwealth to . . . encourage private societies and public institutions, . . . for the promotion of agriculture, arts, sciences, commerce, trades, manufactures." [3]

"The word 'person' may extend and be applied to bodies politic and corporate." [4] Thus a corporation is a person who may bring a petition to quiet title,[5] or a petition for the abatement of a tax.[6] So a corporation is entitled to notice of injury on a highway, etc., like any other "person" obliged to keep the same in repair.[7] It may not sell liquor except in accordance with law,[8] and is subject to the rules governing service of process on persons.[9]

So, both the word "person" and the word "individual" in the tax laws apply to corporations.[10]

In some cases, however, where the wording of a statute is such as definitely to exclude corporations, it will be so construed in spite of the section above quoted.[11]

[2] Const., Part I., Art. VI.

[3] Const., Part II., chap. V., sect. II.

[4] R. L., c. 8, § 5, cl. 16.

[5] Jeffries Neck Pasture Proprietors v. Ipswich, 153 Mass. 42.

[6] National Bank of Commerce v. New Bedford, 155 Mass. 313.

[7] Mack v. Boston & Albany R. Co., 164 Mass. 393.

[8] Enterprise Brewing Co. v. Grime, 173 Mass. 252, 256.

[9] Aldrich v. Blatchford, 175 Mass. 369.

[10] Otis Company v. Ware, 8 Gray, 509, 511; Trustees of Greene Foundation v. Boston, 12 Cush. 54, 59.

[11] Steel Edge, etc., Co. v. Manchester Bank, 163 Mass. 252 (in regard to proceedings in insolvency under Pub. St., c. 157, § 136).

b. Scope of the Act — Financial, insurance and public service corporations, when included.

It will be noticed that the act does not apply to corporations engaged in financial, insurance and public service operations *to be carried on inside the State,* although corporations may be organized under the law to carry on "any lawful business" elsewhere. Domestic corporations engaged here in such pursuits are regulated by other statutes which are not affected by the present act, except as to certain matters of taxation.[12]

On the other hand, corporations engaged in financial, insurance and public service operations *outside the State* are within the act.[13]

It has been held that a corporation which receives money on deposit and issues certificates of deposit therefor, is engaged in a banking business.[14]

§ 2. Rights and liabilities of existing corporations.

"Corporations organized under general laws shall be subject to the provisions of all laws hereafter enacted which may affect or alter their corporate rights or duties or which may dissolve them; but they shall, notwithstanding their dissolution, be subject to the provisions of sections fifty-two and fifty-three.[15] Such amendment, alteration or dissolution shall not take away or impair any remedy which may exist by law, consistently with said sections, against such corporations, their stockholders or officers for a liability previously incurred. The charters of all corporations which are subject to the provisions of this act and which

[12] As to Railroad Corporations, Railroads, and Street Railway Companies, St. 1906, c. 463; Savings Banks and Institutions for Savings, R. L., c. 113; Co-operative Banks, R. L., c. 114; Banks and Banking, R. L., c. 115; Trust Companies, R. L., c. 116; Mortgage Loan and Investment Companies, R. L., c. 117; Insurance, St. 1907, c. 576; Fraternal Beneficiary Corporations, R. L., c. 119; Assessment Insurance, R. L., c. 120; Gas and Electric Light Companies, R. L., c. 121; Companies Engaged in the Transmission of Electricity, R. L., c. 122; Wharves, Real Estate in Common, Fields and Aqueduct Corporations, R. L., c. 123; Agricultural and Horticultural Societies, R. L., c. 124; Charitable Corporations, R. L., c. 125; Cemetery and Crematory Corporations, R. L., c. 78.

[13] Mexican Central R. Co. v. Commonwealth, 192 Mass. 129.

[14] Op. Atty.-Gen., June 11, 1904.

[15] Corresponding to R. L., c. 109, §§ 53, 54.

have been incorporated by special law since the eleventh day of March in the year eighteen hundred and thirty-one and of all such corporations as may be hereafter incorporated by special law shall be subject to amendment, alteration or repeal by the general court. Corporations of the kind which are subject to the provisions of this act, and which were incorporated by special law before such date, may, by amendment to their certificate of organization, adopted as provided in section forty, and filed as provided in section forty-one, reorganize under this act, and thereupon and thereafter, they shall be governed in all respects by its provisions." [16]

[16] St. 1903, c. 437, § 2. See R. L., c. 109, § 3; Pub. St., c. 105, §§ 2, 3; Gen. St., c. 68, § 41; Rev. St., c. 38, § 36; c. 44, § 23; St. 1830, c. 81. Citations — Pub. St., c. 105, § 2: Greenfield v. County Commissioners, 135 Mass. 570.

Pub. St., c. 105, § 3: Watuppa Reservoir Co. v. Fall River, 147 Mass. 569, 18 N. E. Rep. 465; Attorney-General v. Old Colony R. R., 160 Mass. 84, 35 N. E. Rep. 252; Hale v. Cheshire Railroad, 161 Mass. 444, 37 N. E. Rep. 307; Revere Water Co. v. Winthrop, 192 Mass. 464.

Gen. St., c. 68, § 41: Metropolitan R. Co. v. Quincy R. Co., 12 Allen, 270; Agricultural Branch R. Co. v. Winchester, 13 Allen, 33; Com. v. Eastern R. R., 103 Mass. 254; Com'rs Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446; Mayor of Worcester v. Norwich & Worcester R. R. Co., 109 Mass. 103; Metropolitan R. R. Co. v. Highland St. R. R. Co., 118 Mass. 293; Worcester & Nashua R. R. Co. v. Railroad Com'rs, 118 Mass. 568; Thornton v. Marginal Freight Railway, 123 Mass. 32; Rice v. Bank, 126 Mass. 304; Attorney-General v. Old Colony Railroad, 160 Mass. 84, 35 N. E. Rep. 252.

Rev. St., c. 44, § 23: Opinion of the Justices, 9 Cush. 605; Mass. Gen. Hospital v. State Life Co., 4 Gray, 234; Com. v. Essex Co., 13 Gray, 252; Fitchburg R. R. Co. v. Grand Junction R. R. Co., 4 Allen, 205; Com. v. Eastern R. R. Co., 103 Mass. 254; Com'rs Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446; Parker v. Metropolitan R. R. Co., 109 Mass. 506; Metropolitan R. R. v. Highland St. R. R. Co., 118 Mass. 293; Attorney-General v. Old Colony Railroad, 160 Mass. 84, 35 N. E. Rep. 252.

Rev. St., c. 38, § 36: Curtis v. Harlow, 12 Met. 4; Gray v. Coffin, 9 Cush. 200.

St. 1830, c. 81: Mass. Gen. Hospital v. State Mutual Life Ass. Co., 4 Gray, 234; Durfee v. Old Colony, etc., R. Co., 5 Allen, 240; Com'rs Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 451; Dodge v. Boston & Providence R. Co., 154 Mass. 302, 28 N. E. Rep. 243; Roxbury v. Boston & Providence R. R. Co., 6 Cush. 431; Attorney-General v. Old Colony Railroad, 160 Mass. 83, 35 N. E. Rep. 252; Proprietors of Mills v. Commonwealth, 164 Mass. 231, 41 N. E. Rep. 280.

See also, generally, Crease v. Babcock, 23 Pick. 334; Oliver v. Washington Mills, 11 Allen, 268; Central Bridge Corporation v. Lowell, 15 Gray, 106.

a. Right of alteration, amendment and repeal of charters.

Although the first general act governing corporations was passed in 1808,[17] the first statute enabling corporations to organize under a general law was passed in 1851.[18] Meanwhile, in 1830, an act was passed making the charters of all corporations granted after March 11, 1831, which contained no express provision limiting the duration of the corporation's existence, subject to alteration, amendment and repeal at the pleasure of the Legislature.[19] Before this statute it was not customary to reserve any right of alteration, amendment or repeal.[20]

The object of inserting this provision was to avoid the consequences of the decision in the Dartmouth College case, to the effect that a charter, granted upon a valuable consideration, was a contract between the corporation and the State, which could not be constitutionally impaired at the pleasure of the Legislature.[21]

b. Effect of the reserved power.

The reservation of the power of alteration, amendment and repeal was not unconstitutional as a reservation of a power, in its nature judicial,[22] and was as potent and effective as if inserted in the special charters.[23] The reservation of this power has been continued down to the present time,[24] and in

[17] St. 1808, c. 65.

[18] St. 1851, c. 133.

[19] St. 1830, c. 81.

[20] Middlesex Turnpike Corporation v. Swan, 10 Mass. 384; Proprietors of Mills v. Commonwealth, 164 Mass. 227, 41 N. E. Rep. 280.

[21] Dartmouth College v. Woodward, 4 Wheat. 518. Cf. Montclair v. New York, etc., Ry. Co., 45 N. J. Eq. 436; Zabriskie v. Hackensack, etc., Ry. Co., 18 N. J. Eq. 178; Rockland Water Co. v. Camden, etc., Water Co., 80 Me. 544; Crease v. Babcock, 23 Pick. 334; Pierce v. Emery, 32 N. H. 484.

[22] Crease v. Babcock, 23 Pick. 334.

[23] Crease v. Babcock, 23 Pick. 334; Mass. General Hospital v. State Mutual Life Assurance Co., 4 Gray, 227, 234; Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446.

[24] Rev. St., c. 44, § 23; Gen. St., c. 68, § 41; Pub. St., c. 105, § 3; R. L., c. 109, § 3; Attorney-General v. Old Colony Railroad, 160 Mass. 84, 35

case of any alteration or amendment, subscribers and stockholders are to be regarded as consenting to any changes lawfully made under the reserved power.[25] And where a corporation has been authorized by an amendment to change its enterprise, and a majority of the stockholders have voted to do so, a minority stockholder cannot maintain a bill in equity to have such new occupation enjoined, if the charter is subject to the reserve power.[26]

c. Limitations upon the reserved power.

The act of 1830 provided that no charter should be repealed unless for violation of charter or other default, where an express provision in the charter prescribed the period of corporate existence.[27] But a mere condition making a charter void unless certain things are done within a given time, or giving the State a right of purchase in certain contingencies, does not make the corporate existence a limited one within the meaning of this provision.[28]

d. — Implied limitations.

In addition to this express limitation, there is the implied limitation that the alterations or amendments must be reasonable. "The reservation of power is broad and comprehensive. Whatever may be its limitations, it at least reserves to the Legislature the right to make any reasonable amendments regulating the mode in which the franchise granted shall be used and enjoyed which do not defeat or essentially impair the object of the grant, or take away property or rights which have become vested under a legitimate exercise of the powers granted." [29] "The rule to be extracted is this, that where,

N. E. Rep. 252; Revere Water Co. v. Winthrop, 192 Mass. 464. Cf. State v. Maine Central R. Co., 66 Me. 488.

[25] Agricultural Branch R. R. Co. v. Winchester, 13 Allen, 33; South Bay Meadow Dam Co. v. Gray, 30 Me. 547.

[26] Durfee v. Old Colony, etc., R. Co., 5 Allen, 230, 240. See Op. Atty.-Gen., April 22, 1904.

[27] St. 1830, c. 81. Cf. Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392.

[28] Roxbury v. Boston & Providence R. Co., 6 Cush. 424.

[29] Parker v. Metropolitan R. Co., 109 Mass. 506, 508, per Morton, J.;

under the power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away property or rights which have become vested under a legitimate exercise of the powers granted." [30]

e. Instances of exercise of the reserved power. — Lawful exercise.

Among the statutes making charter changes which have been sustained under this provision are the following: Authorizing a lease of a railroad to another and a change of termini.[31] Compelling a railroad to erect a station house and to stop trains there.[32] Authorizing another street railway to lay tracks through the same streets as the first railway, or to use the tracks of the latter, on making compensation for the wear of the track, but not for the diminution of profits or the value of the franchise.[33] Compelling railroads to maintain a union station.[34] Limiting the rates of ferry companies.[35] Consolidating two railroad companies.[36]

Roxbury v. Boston & Providence R. Co., 6 Cush. 424; Commonwealth v. Essex Co., 13 Gray, 239; Fitchburg R. Co. v. Grand Junction R. Co., 4 Allen, 198; Commonwealth v. Eastern R. Co., 103 Mass. 254; Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446. Cf. Proprietors of Machias Boom v. Sullivan, 85 Me. 343; Proprietors of Machias Boom v. Holway, 89 Me. 236.

[30] Commonwealth v. Essex Co., 13 Gray, 239, 253, per Shaw, C. J.; Watuppa Reservoir Co. v. Fall River, 147 Mass. 548, 569, 18 N. E. Rep. 465; Commonwealth v. New Bedford Bridge, 2 Gray, 239, 348; Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 451; Parker v. Metropolitan R. Co., 109 Mass. 506, 508; Binghamton Bridge, 3 Wall. (U. S.) 351; Holyoke Co. v. Lyman, 15 Wall. (U. S.) 500; Zabriskie v. Hackensack, etc., R. Co., 18 N. J. Eq. 178.

[31] Durfee v. Old Colony, etc., R. Co., 5 Allen, 230.

[32] Commonwealth v. Eastern R. Co., 103 Mass. 254.

[33] Metropolitan R. Co. v. Highland Ry. Co., 118 Mass. 293; Worcester & Nashua R. Co. v. Railroad Commissioners, 118 Mass. 568; Thornton v. Marginal Freight Railway, 123 Mass. 32; Pennsylvania College Cases, 13 Wall. 190.

[34] Worcester v. Norwich & Worcester R. Co., 109 Mass. 103.

[35] Parker v. Metropolitan R. Co., 109 Mass. 506.

[36] Hale v. Cheshire Railroad Co., 161 Mass. 443, 37 N. E. Rep. 307. See 2 Op. Atty.-Gen. 484.

f. — Unlawful exercise of the reserved power.

On the other hand, a corporation cannot be compelled to pay a proportion of all dividends on shares of non-resident owners into the public treasury.[37] Nor can the Legislature alter the financial terms of a contract between the proprietors of a bridge and a city, which has been acted on so that interests are vested.[38] Nor, where a fishway has been duly made to the satisfaction of the proper authorities, can the Legislature, in the exercise of its power to regulate fisheries, order different fishways to be made.[39]

g. Repeal of charter.

When a corporation is once formed, it can be avoided only by the Legislature or at the suit of the Commonwealth, and not upon the application of private individuals.[40] "Upon the absolute repeal of a charter by the Legislature, acting within the limits of its constitutional authority, the corporation ceases to exist, and no judgment can afterwards be rendered against it in an action at law. But such repeal does not impair the obligation of contracts made by the corporation with other parties during its existence, or prevent its creditors or stockholders from asserting their rights against its property in a court of chancery, in accordance with the reasonable regulations of the Legislature, or with the general principles and practice in equity." [41]

h. — Attempt to organize under a repealed statute.

Where the attempt is made to organize a corporation under a repealed statute, no incorporation is effected; but, if the pro-

[37] Oliver v. Washington Mills, 11 Allen, 268.

[38] Central Bridge Corporation v. Lowell, 15 Gray, 106.

[39] Commonwealth v. Essex Company, 13 Gray, 239, 253.

[40] Rice v. Bank, 126 Mass. 304.

[41] Thornton v. Marginal Freight Railway, 123 Mass. 32, citing Foster v. Essex Bank, 16 Mass. 245; Read v. Frankfort Bank, 23 Maine, 318; Merrill v. Suffolk Bank, 31 Maine, 57; Mumma v. Potomac Co., 8 Pet. (U. S.) 281; Curran v. Arkansas, 15 How. (U. S.) 304; Bacon v. Robertson, 18 How. (U. S.) 480; Lum v. Robertson, 6 Wall. (U. S.) 277.

visions of law existing at the time the attempt is made are complied with, the corporation may be created in spite of the informality.[42]

§ 3. Duties of the commissioner of corporations.

"The commissioner of corporations shall examine the certificates and reports submitted to him under the provisions of this act, and make suitable indorsements upon such as conform to the requirements of law. He shall keep a record of the names of corporations which submit certificates to his inspection, of the date of inspection and of his certificates when given, and of the result in brief of his inspection. He shall report to the attorney-general instances of neglect or omission on the part of corporations to comply with the provisions of this act for the enforcement of the penalties therefor. If a vacancy exists or if the commissioner is absent from his office, the first clerk shall perform the duties of the commissioner, and legal process served upon said clerk shall have the same force and effect as if served upon the commissioner." [43]

§ 4. Corporate powers.

"Every corporation which is subject to the provisions of this act shall have the following powers and privileges and shall be subject to the following liabilities: —

"(a) To have perpetual succession in its corporate name, unless a period for its duration is limited by special law.

"(b) To sue or be sued in its corporate name, and to prosecute or defend to final judgment and execution or decree in any court of law or equity.

"(c) To have a capital stock to such an amount as may be fixed in its agreement of association or articles of organization or of amendment as hereinafter provided.

"(d) To have a corporate seal, which it may alter at pleasure.

"(e) To elect all necessary officers, fix their compensation and define their duties.

"(f) To hold, purchase, convey, mortgage or lease within or

[42] 2 Op. Atty.-Gen. 362.

[43] St. 1903, c. 437, § 3; R. L., c. 110, § 1; St. 1900, c. 261; Pub. St., c. 106, § 1; St. 1879, c. 288, § 1; St. 1870, c. 224, § 61. Not cited to 193 Mass., incl.

without this commonwealth such real or personal property as the purposes of the corporation may require.

"(g) To make contracts, incur liabilities and borrow money on its credit and for its use.

"(h) To make by-laws not inconsistent with the laws of this commonwealth for regulating its government and for the administration of its affairs as hereinafter provided.

"(i) To be dissolved or to have its affairs wound up in the manner hereinafter provided." [44]

a. Generally.[45]

A corporation has no powers, except those expressly given to it or necessarily incident to powers given.[46] "It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a

[44] St. 1903, c. 437, § 4; R. L., c. 109, §§ 4, 6; Pub. St., c. 105, § 4; Gen. St., c. 60, § 2; c. 68, § 1; Rev. St., c. 38, § 6; c. 44, §§ 1, 6; St. 1833, c. 83, § 1; St. 1829, c. 53, § 1; St. 1808, c. 65, § 1. Citations — Pub. St., c. 105, § 4: Blair v. Telegram Newspaper Co., 172 Mass. 203, 51 N. E. Rep. 1080.

Rev. St., c. 38, § 6: Whittenton Mills v. Upton, 10 Gray, 596.

Rev. St., c. 44, § 1: Wiggin v. Baptist Church, 8 Met. 309; Long Pond Mut. Fire Ins. Co. v. Houghton, 6 Gray, 84; Hale v. Mechanics' Mut. Fire Ins. Co., 6 Gray, 173; Boston Acid Mfg. Co. v. Moring, 15 Gray, 214.

St. 1833, c. 83, § 1: Com. v. Daley, 4 Gray, 209.

See also, generally, Portsmouth Livery Co. v. Watson, 10 Mass. 91.

[45] See also ultra vires acts, infra *et-zo*.

[46] Salem Mill Dam v. Ropes, 6 Pick. 23; Sutton Parish v. Cole, 3 Pick. 232; Brown v. Winnisimett Co., 11 Allen, 326, 334; Nantasket Beach Steamboat Co. v. Shea, 182 Mass. 147; Davis v. Smith American Organ Co., 131 Mass. 258, 276; Monument Nat. Bank v. Globe Works, 101 Mass. 57, 58. Cf. Scots Charitable Society v. Shaw, 8 Mass. 532; National Pemberton Bank v. Porter, 125 Mass. 333; Watuppa Reservoir v. Mackenzie, 132 Mass. 71, 74; McCulloch v. Maryland, 4 Wheat. 316, 414; State v. Hancock, 35 N. J. L. 537; Franklin Co. v. Lewiston Institution, 68 Me. 43; Plumner v. Penobscot Lumbering Assn., 67 Me. 363; Ellerman v. Chicago Junction, etc., Co., 49 N. J. Eq. 217, 241.

contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of law will sustain no action on the contract against the corporation." [47]

"The implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those which are expressly granted, but comprise all that are necessary, in the sense of being appropriate, convenient and suitable for such purposes, including the right of a reasonable choice of means to be employed." [48]

b. Power to sue and to be sued.[49]

This is a power which applies to corporations generally, including foreign corporations.[50]

In suits by or against corporations care should be taken to distinguish between the corporation itself and its officers, and the corporation should be correctly described.[51]

Domestic corporations doing business in another State under a license from that State are bound by all reasonable statutes of such State, relating to service of process.[52]

Incorporated proprietors of common lands are included among the "persons" who may bring a petition to quiet title.[53]

For the purpose of protecting the property of a corporation

[47] Davis v. Old Colony R. Co., 131 Mass. 258, 259, per Gray C. J.

[48] Flaherty v. Benovelent Society, 99 Me. 253, 255, per Savage J.

[49] As to the restraint of ultra vires acts in equity, see infra *so*.

As to the liability of corporations in tort, see infra, § 17, *q*.

As to suits by minority stockholders in the name of the corporation, see infra, § 24, *b*.

As to the attachment and sale on execution of corporate shares, see infra, § 28, *f*.

As to suits by and against foreign corporations, see infra, § 62.

[50] Portsmouth Livery Co. v. Watson, 10 Mass. 91.

[51] Bartlett v. Brickett, 14 Allen, 62; Montague v. Smith, 13 Mass. 396.

[52] Bruning v. Brotherhood Accident Co., 151 Mass. 115; Reyer v. Odd Fellows Accident Assoc., 157 Mass. 367; Gillespie v. Commercial Ins. Co., 12 Gray, 201.

[53] Jeffries Neck Pasture Proprietors v. Ipswich, 153 Mass. 42.

in possession from tortfeasors, it is enough to show a corporation de facto.[54]

In an action by a corporation upon a written guaranty, where the defense is forgery, evidence of the officers of the corporation that they supposed the instrument genuine, and delivered goods on the faith of it, is admissible.[55]

c. — Proof of incorporation.[56]

"If it is alleged in an action at law or suit in equity that a party is . . . a corporation, such allegation shall be taken as admitted unless the party controverting it files in court within the time allowed for the answer thereto, or within ten days after the filing of the paper which contains such allegation a special demand for its proof." [57]

Where the rules of the court in which the action is first tried do not require an answer in writing, and the defendant fails to demand proof of the incorporation of the plaintiff, he cannot raise the question upon appeal.[58]

In accordance with the general presumption of the statute, where a bond is sued on and runs to a party as a corporation, it is prima facie evidence of the incorporation.[59] So in the case of a note running to a foreign corporation.[60]

[54] Jeffries Neck Pasture Proprietors v. Ipswich, 153 Mass. 42.

[55] Worcester Coal Co. v. Utley, 167 Mass. 558. As to when an individual is liable for goods purchased ostensibly on behalf of a corporation which in reality had no existence, see infra, § 7, *g*.

[56] Cf. infra, § 6, *g*, *h*.

[57] R. L., c. 173, § 123; Pub. St., c. 167, § 87; St. 1881, c. 113. Citations — Pub. St., c. 167; § 87: Cabana v. Holyoke Conclave, 160 Mass. 2.

St. 1881, c. 113: Goodwin Co. v. Darling, 133 Mass. 358.

Historical. Prior to April 17, 1881, a general denial put in issue the corporate existence of the plaintiff. Goodwin Co. v. Darling, 133 Mass. 358; Hungerford National Bank v. Van Nostrand, 106 Mass. 559; Mosler v. Potter, 121 Mass. 89; Hebron Church v. Smith, 121 Mass. 90, note; Williamsburg Ins. Co. v. Frothingham, 122 Mass. 391. Cf. Gott v. Adams Express Co., 100 Mass. 320; Whitmore v. Plymouth Cong. Soc., 2 Gray, 306; Greenwood v. Lake Shore R. Co., 10 Gray, 373; Plymouth Christian Soc. v. Macomber, 3 Met. 235.

[58] Cabana v. Holyoke Conclave, 160 Mass. 1.

[59] Williamsburg Ins. Co. v. Frothingham, 122 Mass. 391; Conard v. Atlantic Ins. Co., 1 Pet. 386, 450.

[60] Williams v. Cheney, 3 Gray, 215; Topping v. Bickford, 4 Allen, 120.

As between third parties, a written agreement to purchase shares of a certain corporation is an admission by the purchaser of the existence of the corporation.[61]

d. — Acts of incorporation are public acts.

All acts of incorporation are public acts, and as such may be declared on and given in evidence.[62]

e. — Printed copies of statutes as evidence.

"The printed copies of all statutes, acts and resolves of the Commonwealth, public or private, which are published under the authority of the Commonwealth . . . shall be admitted as sufficient evidence thereof in all courts of law and on all occasions." [63]

This becomes of importance where the corporation is organized under a special act.

f. — Venue of actions. (1) Transitory actions.

Transitory actions may be brought by or against corporations as follows:

"If both parties are corporations . . . in any county in which either corporation has an established or usual place of business, or in which it held its last annual meeting, or usually holds its meetings." [64]

[61] Mann v. Williams, 143 Mass. 394.

[62] R. L., c. 175, § 72; Pub. St., c. 169, § 68; Gen. St., c. 3, § 5; Rev. St., c. 2, § 3. Citations —

R. L., c. 175, § 72: Am. Steel & Wire Co. v. Bearse, 194 Mass. 596.

Pub. St., c. 169, § 68: Commonwealth v. Carroll, 145 Mass. 406; Attorney-General v. McCabe, 172 Mass. 420.

Gen. St., c. 3, § 5: Davis v. Old Colony R. R., 131 Mass. 260;

Rev. St., c. 2, § 3: Boynton v. Middlesex Mutual Ins. Co., 4 Met. 215; Worcester Medical Institute v. Harding, 11 Cush. 288; Fisher v. Essex Bank, 5 Gray, 379; Nute v. Hamilton Mut. Ins. Co., 6 Gray, 183; Whittenton Mills v. Upton, 10 Gray, 598.

See also, generally, Richardson v. Sibley, 11 Allen, 65, 72.

[63] R. L., c. 175, § 73; St. 1889, c. 387, § 1; Pub. St., c. 169, § 69; Gen. St., c. 131, § 62; Rev. St., c. 94, § 58; St. 1805, c. 36.

[64] R. L., c. 167, § 7, cl. 2; Pub. St., c. 161, § 8, cl. 3; Gen. St., c. 123, § 5, cl. 3; Rev. St., c. 90, § 16, cl. 3.

Citations. — Gen. St., c. 123, § 5, cl. 3: Vermont, etc., R. Co. v. Orcutt, 16 Gray, 116.

Rev. St., c. 90, § 16, cl. 3: Vermont, etc., R. Co. v. Orcutt, 16 Gray, 116.

"If one party is a corporation . . . and the adverse party is a natural person, in any county in which, by the provisions of [the last clause] the corporation might sue or be sued, or in the county in which the natural person lives or has a usual place of business." [65]

"A transitory action shall, except as otherwise provided, if any one of the parties thereto lives in the commonwealth, be brought in the county in which one of them lives or has his usual place of business. If brought in any other county, unless transferred under the provisions of section fourteen [relating to actions brought in the wrong county], the writ shall abate and the defendant shall be allowed double costs. If neither party lives in the commonwealth, the action may be brought in any county." [66]

(2) Local actions.

A local action against a corporation must be brought in the county in which the cause of action arises.[66a]

"An action of replevin shall be brought in the county in which the goods or beasts are detained." [67]

(3) Usual place of business.

This must be a place where business is carried on by the party in question under his control and on his own account.[68] Thus a turnpike corporation, which exercises its franchises in several counties, and has in one of them a toll-house where it keeps an agent to collect tolls and sell tickets, and where its treasurer sometimes pays workmen it employs, has "an established or usual place of business" in such county.[69] And this

[65] R. L., c. 167, § 7, cl. 3; Pub. St., c. 161, § 8, cl. 3; Gen. St., c. 123, § 5, cl. 3; Rev. St., c. 90, § 16, cl. 3.

Citations. — Gen. St., c. 123, § 5, cl. 3: Vermont, etc., R. Co. v. Orcutt, 16 Gray, 116.

Rev. St., c. 90, § 16, cl. 3: Vermont, etc., R. Co. v. Orcutt, 16 Gray, 116.

[66] R. L., c. 167, § 1.

Historical. Prior to the Revised Statutes, a corporation could sue or be sued in any county. Taunton, etc., Turnpike v. Whiting, 9 Mass. 321; Raymond v. Lowell, 6 Cush. 524, 529. Prior to St. 1856, c. 70, now embodied in R. L., c. 167, § 1, supra, a non-resident plaintiff might sue a corporation in any county. Raymond v. Lowell, 6 Cush. 524.

[66a] Vermont, etc., R. Co. v. Orcutt, 16 Gray, 116.

[67] R. L., c. 167, § 3; Pub. St., c. 184, § 11; Gen. St., c. 143, § 11; Rev. St., c. 113, § 28; St. 1789, c. 26, § 4.

[68] Little v. Cambridge, 9 Cush. 298, 301.

[69] Rhodes v. Salem, etc., Bridge Co., 98 Mass. 95.

is so, even though it has an office in another county, where its books are kept and its meeting are held, and which is used by its treasurer and superintendent.[70]

Similarly, where a corporation holds its meetings and keeps its records in a certain office, and has the street and number of such office on its letter heads, it has a usual place of business there, although the office was hired by a firm of which the treasurer is a member.[71] So, a foreign corporation has a usual place of business here where its principal officers are to be found, where it has its furniture and where the usual business carried on by the president and treasurer of a corporation is transacted.[72]

On the other hand, where a man had a shop in one town, but did business in another from a wagon, it was held his usual place of business was in the former town.[73]

g. — Commencement of process.

"In actions against corporations, and in other actions in which property may be attached, but in which the defendant is not liable to arrest, the writ of attachment and original summons may be combined in one, requiring the officer to attach the goods and estate and to summon the defendant." [74]

Writs, how served.

"In an action against a corporation . . . the summons shall be served by leaving the original or copy, as the case may be, with the clerk, cashier, agent or any other officer who has charge of its business; and if no such officer is found within the county, the summons may be served on any member of the corporation." [75]

Under this section, a service upon the plaintiff as president of a defendant corporation is not sufficient, although no other

[70] Rhodes v. Salem, etc., Bridge Co., 98 Mass. 95.

[71] Barre National Bank v. Hingham Manuf. Co., 127 Mass. 563, 567.

[72] Nat. Bank of Commerce v. Huntington, 129 Mass. 444.

[73] Palmer v. Kelleher, 111 Mass. 320.

[74] R. L., c. 167, § 17; Pub. St., c. 161, § 16; Gen. St., c. 123, § 12; Rev. St., c. 90, § 5.

As to abatement of capias writs improperly used, see Cooke v. Gibbs, 3 Mass. 193, 197; Willington v. Stearns, 1 Pick. 497. See also R. L., c. 173, § 46.

[75] R. L., c. 167, § 36; Pub. St., c. 161, § 36; Gen. St., c. 123, § 30; Rev. St., c. 90, § 43; St. 1833, c. 124.

officer is found within the precinct.[76] On the other hand, it cannot be said as a matter of law that an assistant treasurer is not such an officer as the statute contemplates.[77] It would seem that a superintendent of a factory or store is a proper person upon whom to serve, if none of the officers mentioned in the statute is available.

Time of service.

Writs must be served not less than fourteen days before the return day, and the return day cannot be more than ninety days from date, in the case of writs issuing from the Supreme and Superior Courts. The first Monday of each month is a return day.[78]

In the case of Police and District Courts and the Municipal Court of Boston, writs must be served not less than seven days before the return day, if returnable in the same county, and not less than fourteen days before the return day if they run into another county. The return day cannot be more than sixty days from date, and each Saturday is a return day.[79]

In all cases, in reckoning time the day of service is included in the period of the days before the return day that the writ must be served.[80]

Writs can be entered late by consent of parties or leave of court; but leave cannot be granted to enter a writ later than the return day succeeding the one or which the writ is returnable.[81]

h. — Trustee process.

"All personal actions, except actions of tort for malicious prosecution, for slander or libel or for assault and battery and actions of replevin, may be commenced by the trustee process, and any person or corporation may be summoned as trustee of the defendant therein; but a person who is not an inhabitant of the commonwealth, or a corporation which is not established under its laws,

[76] Buck v. Ashuelot Manuf. Co., 4 Allen, 357.

[77] Harriman v. Reading, etc., R. Co., 173 Mass. 28, 38.

[78] R. L., c. 167, §§ 21, 24, 27. As to the general subject of practice, see Hall's Practice Schedule.

[79] R. L., c. 167, §§ 22, 25, 27.

[80] Butler v. Fessenden, 12 Cush. 78. Cf. Adams v. Cummisky, 4 Cush. 420; Wheeler v. Bent, 4 Pick. 167.

[81] Dudley v. Keith, 153 Mass. 104.

shall not be so summoned unless he or it has a usual place of business in the commonwealth." [82]

Trustee writs issuing from a police or district court or the Municipal Court of Boston must be served not less than seven days before the return day in every case, and the return day cannot be more than thirty days from date.[83]

As to what is "a usual place of business" see supra, under f (3).

A corporation "summoned as trustee in the supreme judicial or the superior court shall appear and file his answer within ten days, or in a police, district or municipal court or before a trial justice, within three days, after the return day of the writ, unless further time is allowed by the court or justice. The answer shall disclose plainly, fully and particularly what goods, effects or credits, if any, of the defendant were in the hands or possession of the trustee when the writ was served upon him." [84]

"A corporation which is summoned as trustee may appear and answer by its cashier, treasurer, secretary or such other officer as it shall appoint or as the court or justice shall require to attend for that purpose, and his answer and examination, under oath, shall be received as the answer and examination of the corporation." [85]

"If an officer, agent or other person who appears and answers for a corporation which is so summoned, knowingly and wilfully swears falsely in his answer or upon his examination, he shall be liable in an action of tort to the plaintiff in the trustee process, or to his executor or administrator, for the full amount due on the judgment recovered therein, with interest, to be paid out of his own goods and estate." [86]

[82] R. L., c. 189, § 1.

Historical. Corporations could not be summoned as trustee prior to St. 1832, c. 164. Union Turnpike Road v. Jenkins, 2 Mass. 37; National Bank of Commerce v. Huntington, 129 Mass. 444; and foreign corporations could not be so summoned before St. 1870, c. 194. Smith v. Mutual Life Ins. Co., 14 Allen, 336, 342; Gold v. Housatonic R. Co., 1 Gray, 424; Danforth v. Penny, 3 Met. 564; Larkin v. Wilson, 106 Mass. 120; Nat. Bank of Commerce v. Huntington, 129 Mass. 444.

[83] R. L., c. 189, § 6.

[84] R. L., c. 189, § 9.

[85] R. L., c. 189, § 14; Pub. St., c. 183, § 16; Gen. St., c. 142, § 10; Rev. St., c. 109, § 6; St. 1832, c. 164, § 1.

Citations. — Pub. St., c. 183, § 16: White v. Springfield Inst. Savings, 134 Mass. 232.

Gen. St., c. 142, § 10: Adams v. Tyler, 121 Mass. 381.

Rev. St., c. 109, § 6: Danforth v. Penny, 3 Met. 564; Gold v. Housatonic R. Co., 1 Gray, 425; Adams v. Tyler, 121 Mass. 381.

[86] R. L., c. 189, § 18; Pub. St., c. 183, § 20; Gen. St., c. 142, § 14; Rev. St., c. 109, § 78; St. 1794, c. 65, § 9.

This action, being founded on malfeasance, does not survive the death of the defendant.[87] The same proof is necessary as in a criminal proceeding for perjury.[88]

An answer of a trustee on scire facias voluntarily made under oath before any interrogatories are put to him is an "examination" within the meaning of this section.[89]

i. — Interrogatories.

"If a corporation is a party to an action, the adverse party may examine the president, treasurer, clerk or a director, manager or superintendent or other officer thereof as if he were a party." [90]

This section was intended to substitute a short and simple mode of interrogating an adverse party for the complex method of a bill for discovery; and was suggested by the former practice in equity of making an officer a party in a case where discovery was sought from a corporation.[91] In order to be entitled to file interrogatories of this sort, the party interrogating must prove to the satisfaction of the presiding judge that the other party is a corporation.[92]

Citations. — Gen. St., c. 142, § 14: Stillman v. Hollenbeck, 4 Allen, 391; Fay v. Sears, 111 Mass. 155.

Rev. St., c. 109, § 78: Merrill v. Gold, 1 Cush. 460; Laughran v. Kelly, 8 Cush. 199; Porter v. Stevens, 9 Cush. 534; Phelps v. Stearns, 4 Gray, 106.

[87] Stillman v. Hallenbeck, 4 Allen, 391.

[88] Laughran v. Kelly, 8 Cush. 199; Nutter v. King, 152 Mass. 355.

Cf. Merrill v. Gold, 1 Cush. 457.

[89] Laughran v. Kelly, 8 Cush. 199.

[90] R. L., c. 173, § 61; Pub. St., c. 167, § 53; Gen. St., c. 129, § 50; St. 1852, c. 312, § 66.

Citations. — Pub. St., c. 167, § 53: Davis v. Mills, 163 Mass. 482; Gunn v. New York, etc., R. Co., 171 Mass. 419; Toland v. Paine Furniture Co., 179 Mass. 505; Robbins v. Brockton St. Ry., 180 Mass. 54.

Gen. St., c. 129, § 50: Gott v. Adams Express Co., 100 Mass. 321; Linehan v. Cambridge, 109 Mass. 212.

St. 1852, c. 312, § 66: Hubbard v. Hubbard, 6 Gray, 362; Amherst, etc., R. Co. v. Watson, 8 Gray, 529; Gunn v. New York, etc., R. Co., 171 Mass. 419.

[91] Gunn v. New York, etc., R. Co., 171 Mass. 417; Post v. Toledo, etc., R. Co., 144 Mass. 341, 345. The section does not apply to municipal corporations. Linchan v. Cambridge, 109 Mass. 212.

[92] Gott v. Adams Express Co., 100 Mass. 320.

The general principle applies to interrogatories under this section, that they must be put to obtain facts to maintain the case of the interrogating party and not to discover the case of the adverse party.[93] Also, the information asked for must be official, that is, derived through the connection of the officer with the corporation.[94]

But an officer cannot, it seems, refuse to answer interrogatories on the ground that he has no personal knowledge of the matters inquired of. "An admission is none the less binding because made upon information and belief, and for that reason the party interrogating properly may insist that the party interrogated shall make reasonable inquiries of his servants, agents, and attorneys, who were engaged as such in the transaction in question, for the purpose of ascertaining the facts in relation thereto, and answering accordingly. The president of a corporation occupies a position superior in authority to the other officers and to the employees, and generally speaking has a right to require from them information in regard to matters arising in and connected with the discharge of their duties. In a sense he sustains towards them the relation of employer to employee, or of principal and agent. We do not mean to intimate that the duty of inquiry obliges him to seek information from those who have left the service of the corporation,[95] or that he is to be subjected to unreasonable trouble and expense in answering the interrogatories, or that discovery can extend to all information within the possession of those in the employment of the corporation, however obtained. The interrogatories are addressed to the conscience of the party. They do not require him to set down mere rumors, or simply to state what he has been told. They call for facts, and, in addition to the disclosure of such personal knowledge as he may have, if any, they require such reasonable investigation on his part by means of inquiries from those who are at the

[93] Davis v. Mills, 163 Mass. 481; Gunn v. New York, etc., R. Co., 171 Mass. 417, 421.

[94] Gunn v. New York, etc., R. Co., 171 Mass. 417, 420, 421; Hancock v. Franklin Ins. Co., 107 Mass. 113, 115.

[95] Cf. Robbins v. Brockton St. Ry., 180 Mass. 51, 54.

time subject to his direction or control as will enable him to state what the facts are. The party interrogating cannot compel him to get up his case for him, nor to disclose his own case, though the fact that some of the information required by the answers may be material to his own case will not excuse him from answering, if it also is material to that of the party interrogating. We do not think that the right of discovery extends to all information, however acquired, in the possession of the officer interrogated, or of those subject to his direction or control. If he or they have become possessed of material information derived through other than official channels, or in other ways than in the course of their employment at the time of the transaction in question, we do not think that the party interrogating is entitled to a discovery of it. Possibly, also, if an agent has investigated the matter and has ascertained and reported the facts, the party interrogating may not be entitled to a discovery of them." [96]

One party cannot, however, without an order of court require the other to produce all the books and papers of the corporation in answer to interrogatories, and to file them with the clerk or otherwise exhibit them to inspection.[97]

j. — Signature on pleadings.

"If a corporation is a party to an action or proceedings under the provisions of [R. L., c. 173], all precepts, answers, replications or other papers requiring the signature or oath of the party may be signed or sworn to in behalf of the corporation by an officer or agent thereunto specially authorized." [98]

k. — Quo warranto.[99]

"A person whose private right or interest has been injured or is put in hazard by the exercise of a franchise or privilege not conferred by law by a private corporation or by persons claiming to

[96] Gunn v. New York, etc., R. Co., 171 Mass. 417, 421, per Morton, J.; Toland v. Paine Furniture Co., 179 Mass. 501; Robbins v. Brockton St. Ry. 180 Mass. 51, 54.

[97] Amherst, etc., R. Co. v. Watson, 8 Gray, 529.

[98] R. L., c. 173, § 122; Pub. St., c. 167, § 86; Gen. St., c. 129, § 83; St. 1852, c. 312, § 89. No material citations to 193 Mass.

[99] As to restraint of ultra vires acts in equity, see infra 80.

be a private corporation, whether he is a member of such corporation or not, may apply to a justice of the supreme judicial court in any county for leave to file an information in the nature of a quo warranto." [99a]

" At common law the attorney general ex officio has the right either to sue out a writ of quo warranto, or to bring any information in the nature of a quo warranto, to try the title to a public office, and is not compelled to ask leave of the court; but no private individual at common law has a right to use the name of the attorney-general for the purpose of suing out such a writ or of bringing such an information.[100] The practice of permitting a private individual to apply to this court for leave to file an information in the nature of a quo warranto rests, it

[99a] R. L., c. 192, § 6; Pub. St., c. 186, §§ 17, 18; St. 1871, c. 366; Gen. St., c. 145, §§ 16, 17; St. 1852, c. 312, §§ 42, 43; St. 1851, c. 233, §§ 55, 56.

Citations. — Pub. St., c. 186, §§ 17, 18: Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 72.

Gen. St., c. 145, §§ 16, 17: Fall River Iron Works v. Old Colony, etc., R. Co., 5 Allen, 225; Attorney-General v. Tudor Ice Co., 104 Mass. 241; Rice v. Nat. Bank of Commonwealth, 126 Mass. 300; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

St. 1852, c. 312, §§ 42, 43: Hastings v. Amherst, etc., R. Co., 9 Cush. 596; Lechmere Bank v. Boynton, 11 Cush. 369; Boston, etc., R. Co. v. Midland R. Co., 1 Gray, 341, 357; Boston & Lowell R. Co. v. Salem, etc., R. Co., 2 Gray, 1; Goddard v. Smithett, 3 Gray, 116; Taft v. Adams, 3 Gray, 126; Re New South Meeting House, 13 Allen, 508; Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

St. 1851, c. 233, §§ 55, 56: Attorney-General v. Sullivan, 163 Mass. 446; Hartnet v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

Historical. " Both the writ of quo warranto and the information in the nature of quo warranto were common-law processes. The writ was an original writ issued out of chancery, and was regarded as a writ of right on the part of the crown, and was exclusively a civil process. The information in the nature of a quo warranto was originally a criminal proceeding in which if the issue was found against the defendant, in addition to a judgment of ouster a fine might be imposed. . . . From such investigation as we have been able to make, we cannot find that the writ of quo warranto was ever actually used in the Colony, Province or Commonwealth." Attorney-General v. Sullivan, 163 Mas. 446, 447, per Field, C. J.

[100] So also Haupt v. Rogers, 170 Mass. 71, 73; Goddard v. Smithett, 3

seems, in this commonwealth, upon statute.[101] Furthermore, the court cannot order the attorney-general to file such an information, as he is not an officer of the court.[102]

"The proceedings [under this section] were not intended to be used where a corporation has been duly organized, and is not attempting to exercise any franchise or privilege not conferred by law, but where the alleged grievance is that certain incorporators or stockholders have been deprived of their rights by other incorporators or stockholders in the attempted transfer of the property and franchise of the corporation, or in the election of its officers or in the internal management of the corporation.[103] Therefore, where certain incorporators have tried to sell and transfer the charter of the corporation and to elect officers, the remedy is by suit in the names of the injured parties, and not by information."[104]

Nor will an information lie on the ground that a corporation is unlawfully using its franchise, where all the forms in organization have been complied with and it has obtained its certificate from the secretary of the commonwealth, even though such certifiacte was obtained by fraud;[105] for such a matter can only be raised in proceedings by the state.[106] And, in general, the irregular and illegal exercise by a corporation or by persons claiming to be its officers, of a franchise conferred by law, the illegal sale of its property or the illegal levy of a tax upon its members does not entitle members of the corporation to an information.[107]

Where it does not appear that the petitioner's private right

Gray, 116; Rice v. National Bank of Commonwealth, 126 Mass. 300, 303. Cf. Attorney-General v. Drohan, 169 Mass. 534, where the action was practically a civil action.

[101] Attorney-General v. Sullivan, 163 Mass. 446, 448, per Field, C. J.; Haupt v. Rogers, 170 Mass. 71, 73; Goddard v. Smithett, 3 Gray, 116. Cf. Commonwealth v. Allen, 128 Mass. 308.

[102] Haupt v. Rogers, 170 Mass. 71.

[103] Haupt v. Rogers, 170 Mass. 71, 77, per Field, C. J.; Goddard v. Smithett, 3 Gray, 116.

[104] Haupt v. Rogers, 170 Mass. 71.

[105] Rice v. Nat. Bank of Commonwealth, 126 Mass. 300.

[106] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436.

[107] Goddard v. Smithett, 3 Gray, 116.

or interest is put in hazard, the petition will be denied.[108] So also where the acts complained of are authorized by law.[109]

On the other hand, questions involving the organization of the corporation itself, where private rights are put in peril, are proper to be decided by petition for leave to file an information.

Thus, where the question is whether one set of persons, petitioners for a charter, were the proper persons to organize a corporation, or another set including subscribers to stock, an information will lie.[110]

In the case of a non-business corporation chartered for the purposes of "promoting pleasant relations among its members; discussing, arbitrating and settling all matters pertaining to the prosperity of the jobbing plumbers' supply business; and etsablishing and maintaining a place for social meetings," a plumber who has been blacklisted as to his credit by the corporation may have leave to file an information.[111]

The existence of a remedy by information does not deprive the courts of equity jurisdiction over nuisances.[112]

Hearing.

"The court shall give a summary hearing and if it appears that there is probable cause to believe that the respondent has exercised a franchise or privilege not conferred by law, whereby the private right or interest of the complainant has been injured or is put in hazard, shall grant leave to file the information, which shall be filed in the county in which the respondent has its principal place of business. A copy of the information, with an order of notice returnable, and to be served, when and as the court may order, shall be served on the respondent, and on the attorney-general." [113]

[108] Hastings v. Amherst, etc., R. Co., 9 Cush. 596, where the corporation issued stock below par and began business before the requisite amount of stock was subscribed. Query, as to how far a petitioner should have some right for which there is some remedy at law or in equity. Boston & Providence R. Co. v. Midland R. Co., 1 Gray, 340, 370.

[109] Boston & Providence R. Co. v. Midland R. Co., 1 Gray, 340.

[110] Lechmere Bank v. Boynton, 11 Cush. 369.

[111] Hartnett v. Plumbers Supply Assoc., 169 Mass. 229.

[112] Fall River Iron Works Co. v. Old Colony, etc., R. Co., 5 Allen, 221; Boston & Lowell R. Co. v. Salem, etc., R. Co., 2 Gray, 1.

[113] R. L., c. 192, § 7; Pub. St., c. 186, §§ 19, 20; Gen. St., c. 145, §§ 18, 19; St. 1852, c. 312, §§ 44, 45, 49; St. 1851, c. 233, §§ 57, 58, 63.

At the hearing on the merits of an information to have the charter of a private corporation forfeited, issues may be sent to a jury;[114] but the modern practice is rather against jury trials where the issue is the right of an individual to hold office,[115] especially in proceedings against persons claiming to hold public office.[116]

Query, whether petitions for leave to file an information are within the statutes allowing amendments changing an action at law into a bill in equity.[117]

Injunction.

"If leave is given to file such information, the court, at any time before final judgment, may issue a writ of injunction restraining the respondent from exercising the franchise or privilege in question until further order of the court." [118]

Citations. — Pub. St., c. 186, §§ 19, 20: Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 72.

Gen. St., c. 145, §§ 18, 19: Attorney-General v. Tudor Ice Co., 104 Mass. 241; Rice v. Nat. Bank of Commonwealth, 126 Mass. 300; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

St. 1852, c. 312, §§ 44, 45, 49: Boston & Providence R. Co. v. Midland R. Co., 1 Gray, 341, 357; Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

St. 1851, c. 233, §§ 57, 58, 63: Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

[114] Commonwealth v. Tenth Mass. Turnpike Co., 11 Cush. 171.

[115] Attorney-General v. Sullivan, 163 Mass. 446, 452. Cf. Commonwealth v. Dearborn, 15 Mass. 125.

[116] Attorney-General v. Sullivan, 163 Mass. 446, 452.

[117] Haupt v. Rogers, 170 Mass. 71, 78. In Attorney-General v. Tudor Ice Co., 104 Mass. 239, 241, they are spoken of as if they were actions at law. Cf. Attorney-General v. Adonai Shomo, 167 Mass. 424.

[118] R. L., c. 192, § 8; Pub. St., c. 186, § 21; Gen. St., c. 145, § 20; St. 1852, c. 312, § 46; St. 1851, c. 233, § 59.

Citations. — Pub. St., c. 186, § 21: Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 72.

Gen. St., c. 145, § 20: Attorney-General v. Tudor Ice Co., 104 Mass. 241; Rice v. Nat. Bank of Commonwealth, 126 Mass. 300; Hartnett v. Plumbers Supply Assoc., 160 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

St. 1852, c. 312, § 46: Boston & Providence R. Co. v. Midland R. Co., 1 Gray, 341, 357; Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

Intervention of attorney-general.

"If the attorney-general believes that there has been a usurpation of a franchise or privilege not conferred by law, he may intervene, have control of the subsequent proceedings and demand a judgment of fines and forfeiture, and the complainant shall no longer be liable for costs. The court shall enter judgment according to the principles of the common law." [119]

This section seems to indicate that informations under this chapter are still regarded as of a criminal nature.[120]

"Upon an information in the nature of a quo warranto, which in our practice has superseded the ancient writ of quo warranto, the judgment may be that the franchise usurped be seized into the sovereign's hands, if it be one which the sovereign can repossess and enjoy, or it may be a judgment of ouster.[121] In this Commonwealth, in the case of a business corporation, where the object of the information is merely to declare the charter forfeited and to exclude the corporation from the right to further exercise its franchises, a judgment of ouster is appropriate. Strictly and technically a judgment either of seizure or of ouster probably does not dissolve the

St. 1851, c. 233, § 59: Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

[119] R. L., c. 192, § 9; Pub. St., c. 186, § 22; Gen. St., c. 145, § 21; St. 1852, c. 312, § 49; St. 1851, c. 233, § 63.

Citations. — Pub. St., c. 186, § 22: Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 72.

Gen. St., c. 145, § 21: Attorney-General v. Tudor Ice Co., 104 Mass. 241; Rice v. Nat. Bank of Commonwealth, 126 Mass. 300; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

St. 1852, c. 312, § 49: Boston v. Providence R. Co. v. Midland R. Co., 1 Gray, 341, 347; Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

St. 1851, c. 233, § 63: Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

[120] Attorney-General v. Sullivan, 163 Mass. 446, 449; Goddard v. Smithett, 3 Gray, 116. In Commonwealth v. Fowler, 11 Mass. 339, which was an information at common law, there was a judgment of ouster without a fine.

[121] Campbell v. Talbot, 132 Mass. 174, 176; Attorney-General v. Salem, 103 Mass. 138.

corporation, but it at least suspends the right to exercise its franchises." [122]

Judgment.

"If the attorney-general does not intervene, and the court finds that the respondent has exercised a franchise or privilege not conferred by law, judgment of forfeiture shall not be entered, but judgment shall be entered that the corporation or the persons claiming to be such, be perpetually excluded from the exercise of such franchise or privilege, and that the directors, managers or agents, guilty of the usurpation pay the costs of the complainant." [123]

One result of this section is that the remedy is often practically inadequate; for it affords no remedy for damages already suffered by the wrongful acts of the defendant.[124]

The franchise or privilege from which the corporation is to be excluded is "manifestly a franchise not conferred by law, by the exercise of which the private right or interest of any person is injured or put in hazard." [125]

Respondent's costs.

"If the court finds that the respondent has not exercised a franchise or privilege not conferred by law, he shall recover costs." [126]

[122] Campbell v. Talbot, 132 Mass. 174, 177, per Morton, J.

[123] R. L., c. 192, § 10; Pub. St., c. 186, § 23; Gen. St., c. 145, § 22; St. 1852, c. 312, § 47; St. 1851, c. 233, § 60. Citations. — Pub. St., c. 186, § 23: Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 72.

Gen. St., c. 145, § 22: Fall River Iron Works v. Old Colony, etc., R. Co., 5 Allen, 225; Attorney-General v. Tudor Ice Co., 104 Mass. 241; Rice v. Nat. Bank of Commonwealth, 126 Mass. 300; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

St. 1852, c. 312, § 47: Hastings v. Amherst, etc., R. Co., 9 Cush. 596; Boston & Providence R. Co. v. Midland R. Co., 1 Gray 341, 357; Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

[124] Fall River Iron Works Co. v. Old Colony, etc., R. Co., 5 Allen, 221, 225; argument of counsel in Boston & Lowell R. Co. v. Salem, etc., R. Co., 2 Gray, 1, 22.

[125] Hastings v. Amherst, etc., R. Co., 9 Cush. 596, 600, per Shaw, C. J.

[126] R. L., c. 192, § 11; Pub. St., c. 186, § 24; Gen. St., c. 145, § 23; St. 1852, c. 312, § 48; St. 1851, c. 233, § 60. Citations. — Pub. St., c. 186,

Forfeiture of charter.

An information in the nature of a quo warranto should be prosecuted, if at all, in behalf of and at the expense of the commonwealth, and by or under the immediate direction of the attorney-general.[127] It is not proper to have it brought at the relation of private persons or of municipalities, and any mention of relators may be rejected as surplusage.[128]

I. — Criminal actions.

Where a corporation is required by its charter to do certain things in a certain way within a certain time, it may be indicted for doing them in a different way, although the time has not yet expired.[129] And, in general, a corporation may be indicted for a misfeasance as well as a nonfeasance.[130]

It is provided by statute that "if a corporation, after having been duly served with process, fails to appear, and answer to an indictment or complaint which is brought against it under the laws of this commonwealth, its default shall be recorded, the charges in the indictment or complaint taken to be true, and judgment shall be rendered accordingly." [131]

"If judgment is rendered against a corporation upon an indictment or complaint under the laws of this commonwealth, the court may issue a warrant of distress to compel the payment of the penalty prescribed by law, with interest." [132]

§ 24: Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 72.

Gen. St., c. 145, § 23: Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

St. 1852, c. 312, § 48: Boston & Providence R. Co. v. Midland R. Co., 1 Gray, 341, 357; Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

St. 1851, c. 233, § 60: Attorney-General v. Sullivan, 163 Mass. 446; Hartnett v. Plumbers Supply Assoc., 169 Mass. 229; Haupt v. Rogers, 170 Mass. 73.

[127] Attorney-General v. Adonai Shomo, 167 Mass. 424; Commonwealth v. Union Ins. Co., 5 Mass. 230; Goddard v. Smithett, 3 Gray, 116.

[128] Attorney-General v. Adonai Shomo, 167 Mass. 425; Commonwealth v. Allen, 128 Mass. 308.

[129] Commonwealth v. Newburyport Bridge, 9 Pick. 142.

[130] Commonwealth v. New Bedford Bridge, 2 Gray, 339; Lumbard v. Stearns, 4 Cush. 60.

[131] R. L., c. 220, § 35; Pub. St., c. 215, § 30; Gen. St., c. 174, § 29; St. 1851, c. 348, § 1.

[132] R. L., c. 220, § 36; Pub. St., c. 215, § 31; Gen. St., c. 174, § 30; St. 1851, c. 348, § 2.

A corporation which is acting in accordance with its charter is protected from an indictment for nuisance even though individuals or the public have been injured, unless the charter has been modified by later legislation.[133]

m. Common seal.

"If the seal of a corporation is required by law to a paper, the word 'seal' shall mean an impression of the official seal upon the paper as well as an impression on a wafer or wax affixed thereto." [134]

The seal of a corporation may therefore be a raised impression made by a metal stamp upon the paper of the instrument, without wax or gummed paper, made after the printing of the instrument; and is a good seal if made by order of the corporation.[135] But a mere facsimile of a seal which is part of a printed blank is not a good seal, although sealing be recited in the instrument.[136] " . . . the line must be drawn somewhere, and we are satisfied to draw it so as to exclude written or printed scrawls, scrolls or devices; but so as to include an actual and permanent impression upon the substance of the paper, of the common seal of a corporation." [137]

If an instrument which does not require a seal is executed by the proper officer of the corporation, who attaches his own seal, the seal may be disregarded, and the instrument treated as the simple contract of the corporation; [138] but if the instru-

[133] Commonwealth v. Chapin, 5 Pick. 199; State v. Improvement Co., 97 Maine, 559.

[134] R. L., c. 8, § 5, cl. 19. This provision originally took effect April 21, 1855, and was not retroactive in its operation. Bates v. Boston & New York Central R. Co., 10 Allen, 251.

[135] Bates v. Boston, etc., R. Co., 10 Allen, 251; Hendee v. Pinkerton, 14 Allen, 381; Royal Bank v. Grand Junction, etc., Co., 100 Mass. 444; Corrigan v. Trenton Falls Co., 5 N. J. Eq. 52; Woodman v. York, etc., R. Co., 50 Me. 549. But see McCarthy v. Metropolitan Life Ins. Co., 162 Mass. 254.

[136] Dean v. American Legion of Honor, 156 Mass. 436; Bates v. Boston & New York Central R. Co., 10 Allen, 251; Hendee v. Pinkerton, 14 Allen, 381; McCarthy v. Metropolitan Life Ins. Co., 162 Mass. 254.

[137] Hendee v. Pinkerton, 14 Allen, 381, 389, per Foster, J. So where the by-laws of a corporation require transfers of stock to be under seal, the word "seal" written or printed between brackets on the certificate is not sufficient. Bishop v. Globe Co., 135 Mass. 132.

[138] Sherman v. Fitch, 98 Mass. 59; Brinley v. Mann, 2 Cush. 337;

ment be one requiring a seal, and it has the seal of the corporation and purports to be the act of the corporation, it is good although executed by the officer as officer merely.[139] The use of a certain seal on sundry occasions does not prevent the use of a different seal, if no particular seal has ever been formally adopted by the corporation.[140] But the use of a common seal raises no presumption that it is used as the seal of the corporation, although the instrument recites sealing with the corporate seal.[141]

A corporation need not use a seal unless an individual would be obliged to under the same circumstances.[142]

n. — Who may affix seal.

The corporation seal is usually in the custody of the clerk, sometimes of the treasurer. But any person may affix it to an instrument if the act is done by direction of, or is adopted by the proper corporate officers.[143] Thus, in a case where it did not appear who had affixed the seal, the action of directors two years later in pronouncing the instruments genuine, and of the treasurer for five years in paying interest upon them, were held to be evidence of ratification.[144]

o. — Action on sealed instrument.

Where a contract is made with an individual, and is under seal, no recovery can be had on it against a corporation which

Blanchard v. Blackstone, 102 Mass. 343, 347. Cf. Com. v. Reading Savings Bank, 137 Mass. 431, 443.

[139] Hutchins v. Byrnes, 9 Gray, 367; Haven v. Adams, 4 Allen, 80. The presence of a corporation seal is not even prima facie evidence that the corporation is a party to the instrument. Morrison v. Wilder Gas Co., 91 Me. 492.

[140] Stebbins v. Merritt, 10 Cush. 27. And a corporation may adopt a seal for particular occasion. Mill Dam Foundery v. Hovey, 21 Pick. 417; Porter v. Androscoggin, etc., Railroad, 37 Me. 349.

[141] Raub v. Blairstown Creamery Ass'n, 56 N. J. L. 262.

[142] Fleckner v. Bank of U. S., 8 Wheat. 338; Trundy v. Farrar, 32 Me. 225; Crawford v. Longstreet, 43 N. J. L. 325. See Speirs v. Union Drop Forge Co., 174 Mass. 175, 180.

[143] Royal Bank v. Grand Junction R. Co., 100 Mass. 444.

[144] St. James Parish v. Newburyport Horse Railroad, 141 Mass. 500.

is the real party to it, and has made payments under it;[145] and a corporation is not bound by a deed executed by its treasurer as treasurer and sealed with his own seal.[146] Similarly only a party to the contract can maintain an action upon it.[147]

On the other hand, an agent who affixes his own seal, purporting to bind the corporation and not himself, is not personally liable.[148]

A corporation may be liable on a contract executed by the other party, although it has no seal affixed.[149]

p. — Use of seal as part of signature.

Where a note, with nothing in the body of it to indicate whose note it was, bore the signature of "J. R. treasurer" and also the corporation seal, it was held that it was the note of the corporation.[150]

q. Election of officers.

A provision, in a special charter, that directors and other officers are to be chosen in accordance with the by-laws, is obviously inapplicable to the first choice of officers. When the associates first meet to incorporate they must determine the manner in which all needful officers shall be elected.[151]

r. Hold, purchase, convey, mortgage and lease. Generally.

Under the present act, the powers of the corporation are to be exercised by the directors, except where they are conferred

[145] Congress, etc., Co. v. Worcester Brewing Co., 182 Mass. 355; Saunders v. Saunders, 154 Mass. 337; Flynn v. Massachusetts Benefit Association, 152 Mass. 288; New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381; Flynn v. North American Ins. Co., 115 Mass. 449.

[146] Brinley v. Mann, 2 Cush. 337.

[147] McCarthy v. Metropolitan Life Ins. Co., 162 Mass. 254; Campbell v. New England Ins. Co., 98 Mass. 381, 400; Bailey v. New England Ins. Co., 114 Mass. 177; Rindge v. New England Aid Society, 146 Mass. 286, 289.

[148] Abbey v. Chase, 6 Cush. 54; Murphy v. Welch, 128 Mass. 489, 491; Hutchins v. Byrnes, 9 Gray, 367. Cf. Tapley v. Butterfield, 1 Met. 515; Milton v. Mosher, 7 Met. 244.

[149] Speirs v. Union Drop Forge Co., 174 Mass. 175, 180.

[150] Miller v. Roach, 150 Mass. 140.

[151] Boston Acid Manufacturing Co. v. Moring, 15 Gray, 214.

by statute or by-law upon the stockholders.[152] It seems, therefore, that sales, purchases, mortgages, and leases may be made by the directors alone.[153] A certified copy of the vote should be annexed to the instrument, and, in important transactions, it may be well to have the authority of a special meeting of the stockholders.

Where a committee was empowered by the corporation to authorize the treasurer to convey real estate, it was held that such authority might be communicated orally.[154]

Holding securities.

The act is silent on the extent to which security-holding corporations are legal. Section 23 of the Act forbids a corporation voting on its own stock, and section 72 mentions securities owned by a corporation in connection with the computation of the franchise tax. But these sections throw no light on the question of holding securities permanently or as a principal business. The Attorney-General ruled in 1895 that a corporation could be found under the general law for the purpose of "buying and selling bonds, stock, grain" and other articles of a speculative nature.[155]

In regard to acquiring the shares of other corporations, it has been held that a corporation can sell its property to another corporation, taking stock of the latter in payment, and distributing it among its stockholders.[156] It has also been held that one corporation may take stock of another in payment of a debt,[157] but the court expressed no opinion as to whether a purchase for permanent investment would have been legal.[158]

[152] See infra, § 19.

[153] See Tompson v. Stevenson, 155 Mass. 554.

[154] Hutchins v. Byrnes, 9 Gray, 367.

[155] 1 Op. Atty.-Gen. 275.

[156] Treadwell v. Salisbury Manuf. Co., 7 Gray, 393, 406, citing Hodges v. New England Screw Co., 1 R. I. 347, 3 R. I. 9.

[157] Howe v. Boston Carpet Co., 16 Gray, 493. Cf. Franklin Co. v. Lewiston Institution, 68 Me. 43.

[158] See as to other jurisdictions, Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673; Ellerman v. Chicago Junction Railways Co., 49 N. J. Eq. 217; Minnesota v. Northern Securities Co., 184 U. S. 199; Northern Securities Co. v. United States, 193 U. S. 197.

It seems well established that a corporation cannot purchase the shares of another for merely speculative purposes;[159] or to control the other corporation;[160] and the weight of authority is that a corporation cannot purchase or subscribe for shares in another, unless authorized by charter or unless the transaction is necessary or reasonable for carrying out its own objects.[161]

In one case, it was held that the purchase of all but six shares of the stock of a corporation and all of its property, the election of the officers of the vendee as officers of the vendor, and the transfer of the remaining six shares to them, did not enable the vendee corporation to avail itself of certain charter privileges of the vendor.[162]

s. — Anti-trust law.

There is no anti-trust law in Massachusetts. The United States Act of July 2, 1890[163] forbade any "contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Under this act, the question is not as to intention, but as to the practical effect of the combination in restraining interstate commerce.[164]

If it is desired to escape performance of a contract by claiming it is within the act, the latter must be specially pleaded.[164a]

See also Morawetz, 2d ed., §§ 431, 432; Green's Brice's Ultra Vires, 2d ed., 91 note; 1 Cook, 5th ed., § 317; 1 Thompson, Corp., § 1103. Sometimes authority to hold stock of other corporations is given by statute. E. g. St. 1883, c. 77, § 6; St. 1886, c. 326.

[159] 1 Clark & Marshall, Corp., § 196.

[160] Ibid., § 197; Elkins v. Camden, etc., R. Co., 36 N. J. Eq. 5; Pearson v. Concord R. Co., 62 N. H. 537.

[161] 1 Clark & Marshall, Corp., § 193; Franklin Co. v. Lewiston Insti. for Savings, 68 Me. 43.

[162] French v. Conn. River. Lumber Co., 145 Mass. 261.

[163] C. 647, 26 Stat. L. 209.

[164] See Addystone Pipe, etc., Co. v. U. S., 175 U. S. 211; Bement v. National Harrow Co., 186 U. S. 70; Phillips v. Iola Portland Cement Co., 125 Fed. Rep. 593; Northern Securities Co. v. United States, 193 U. S. 197.

[164a] New York Bank Note Co. v. Kidder Press Mfg. Co., 192 Mass. 391, 404.

t. — Holding own stock.

As to a corporation owning its own shares, see infra, §§ 23, 44.

u. Purchase.[165]

Apart from statute, corporations have the power to purchase property necessary for their business,[166] but not for speculative purposes.[167]

The English rule, that corporations can hold only such property as they are permitted to hold by license or act of parliament, is not generally adopted in this country,[168] although in some instances, chiefly religious corporations, the original charters contained mortmain provisions[169] which have required legislative abrogation. Where such provisions exist they can be enforced only by the State;[170] and where a corporation is authorized to hold lands to a certain amount, the fact that they subsequently increase in value will not invalidate the holding.[171]

v. — Merchandise in bulk.

In view of the common practice for a corporation to buy the business of a firm, an individual or another corporation, and to issue stock therefor, attention is called to the fact that such a transaction is, on its face, within the terms of the Act prohibiting the sale of merchandise in bulk.[172] The statute, per-

[165] As to the Statute of Frauds, see infra under *x*.

[166] Brown v. Winnisimmit Co., 11 Allen, 326; Lyndeborough Glass Co. v. Mass. Glass Co., 111 Mass. 315; Old Colony R. Co. v. Evans, 6 Gray, 25, 39.

[167] Old Colony R. Co. v. Evans, 6 Gray, 25.

[168] 1 Bl. Com. 475; 2 Kent Com. 283; First Parish v. Cole, 3 Pick. 232, 239.

[169] E. g. Park Street Congregational Society.

[170] Davis v. Old Colony R. Co., 131 Mass. 258, 273; State v. Mansfield, 23 N. J. L. 510; De Camp v. Dobbins, 26 N. J. Eq. 36; s. c. 31 N. J. Eq. 670; Jones v. Habersham, 107 U. S. 174, 188.

[171] Harvard College v. Boston, 104 Mass. 470, 490. Cf. State v. Morristown Fire Association, 23 N. J. L. 195.

[172] St. 1903, c. 415, in effect June 8, 1903. This act was held constitutional in J. P. Squire & Co. v. Tellier, 185 Mass. 18. Cited also in Hart v. Brierly, 189 Mass. 600, 601; Wasserman v. McDonnell, 190 Mass.

haps, was not intended to cover such cases, but in view of its language it should be carefully considered in every instance where the creditors of the seller are not immediately paid off or otherwise provided for. The text of this Act is as follows:

"The sale in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser, at least five days before the sale, make a full, detailed inventory, showing the quantity and, so far as possible with exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale; and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller, under oath, to be, to the best of his knowledge and belief, a full, accurate, and complete list of his creditors and of his indebtedness; and unless the purchaser shall, at least five days before taking possession of such merchandise, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, of the proposed sale and of the price, terms, and conditions thereof.[173]

"Sellers and purchasers under this act shall include corporations, associations, co-partnerships, and individuals, but nothing contained in this act shall apply to sales by executors, administrators, receivers, assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any public officer under judicial process." [174]

"The statutory test is whether the sale was made in the usual way in which a merchant owing debts conducts his business, or whether he takes an unusual method of disposing of his property in order to get the money for his own use, leaving his creditors unpaid. This inquiry is essentially an issue of fact depending upon the nature of the seller's business, his ordinary method of making sales, and his indebtedness. A sale of his entire stock by one trader might not be uncommon, while such a sale if made by another would be extraordinary and within the statute." [175]

327; Gallus v. Elmer, 193 Mass. 106; Kelley-Buckley Co. v. Cohen, 81 N. E. Rep. 297 (Mass. 1907).

[173] § 1.

[174] § 2.

[175] Hart v. Brierly, 189 Mass. 598, 601, per Braley, J.

The same test is applicable to a contract to sell to one person a quantity of the product manufactured by a corporation, and the entire product of its factory for a period following.[176]

The statute has no application to a chattel mortgage of a present and all future acquired stock in trade given in good faith upon a valuable consideration, and duly recorded, it not appearing that the mortgagor had any other creditors at the time;[177] but it does apply to a mortgage of an entire stock, outside of the usual course of business, although in satisfaction of a preexisting debt.[178]

The words "stock of merchandise" in the statute do not include tools and fixtures.[179]

The word "void" in the statute means voidable, and a creditor wishing to avoid a sale must use reasonable dispatch and act before rights of bona fide third persons intervene.[180]

The mere failure of a creditor to receive the required notice is not enough to avoid his title under a subsequent bona fide mortgage of the merchandise, especially when he has been told by the seller that the statute has been complied with.[181]

w. — Acquiring property of a partnership.

It should be noticed that where an association or a partnership becomes incorporated, this does not of itself operate to vest its property in the corporation. There must be a formal transfer.[182]

The same is true of property belonging to joint owners who become incorporated.[183]

x. Convey.

At common law, corporations have the power to dispose of property which has become unnecessary to their business. The

[176] Hart v. Brierly, 189 Mass. 598.

[177] Wasserman v. McDonnell, 190 Mass. 326.

[178] Gallus v. Elmer, 193 Mass. 106.

[179] Gallus v. Elmer, 193 Mass. 106.

[180] Kelly-Buckley Co. v. Cohen, 81 N. E. Rep. 297 (Mass. 1907).

[181] Kelly-Buckley Co. v. Cohen, 81 N. E. Rep. 297 (Mass. 1907).

[182] Manahan v. Varnum, 11 Gray, 405. Cf. Wyman v. American Powder Co., 8 Cush. 168; Goddard v. Pratt, 16 Pick. 412, 429; Merrill v. McIntyre, 13 Gray, 157.

[183] Leffingwell v. Eliott, 8 Pick. 455; Holland v. Cruft, 3 Gray, 162.

power to purchase and hold implies the power to sell.[184] But they cannot, without express or implied authority, sell their franchises.[185]

It should be noted that a sale of its personal property in bulk by a corporation is subject to the provisions of the statute noted above, as to sales of merchandise in bulk.[186]

Corporations should also notice the following statute which may subject their employees to penalties:

"Whoever knowingly makes and publishes or knowingly causes to be made and published any false or wilfully misleading representation or advertisement in the form of a book, paper, prospectus, notice or other publication of or concerning any merchandise or commodity offered for sale by any . . . corporation shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than two years, or by both such fine and imprisonment." [187]

Execution of deeds by corporations.[188]

The corporation itself should be the party named in the deed.

The proper form of execution is as follows: In witness whereof the said United Mining Company has caused these presents to be signed by John Smith its treasurer and has caused its corporate seal to be hereto affixed this tenth day of November, 1906.

UNITED MINING COMPANY,
[Corporate seal] by JOHN SMITH, *Treasurer*.[189]

[184] Dupee v. Boston Water Power Co., 114 Mass. 37; Commonwealth v. Smith, 10 Allen, 448, 455. See also infra, § 40, *f*.

Historical. Under Pub. St., c. 106, § 23, a corporation could not convey its real estate except by vote of the stockholders.

[185] Richardson v. Sibley, 11 Allen, 65. Cf. Lothrop Pub. Co. v. Lothrop, etc., Co., 191 Mass. 353, 355.

[186] Supra, under *v*.

[187] St. 1907, c. 383, in effect June 5, 1907.

[188] As to the use of a corporate seal, see supra, under *m*. to *p*. As to the execution of corporate contracts, see infra, *si*.

[189] In Haven v. Adams, 4 Allen, 80, this form was also held good: "In witness whereof the said corporation has caused these presents to be signed by C. D. its president, and its corporate seal to be hereto affixed, C. D. President." So, in Hutchins v. Byrnes, 9 Gray, 367, this form was approved: "In witness whereof the said corporation, by C. D., its treasurer, has hereto set its name and seal, C. D. treasurer." In Ellis v.

Any form of execution which does not purport to be the signature of the corporation itself and does not bear its seal will not bind the corporation, even though it is recited as made on its behalf.[190] On the other hand an officer, who affixes his own seal purporting to bind the corporation and not himself, is not personally liable.[191]

Where an office copy of a deed from a corporation is offered in evidence, purporting to be executed under the authority of a corporation by its president, proof of the authority of the president to execute it is unnecessary. "It is presumed to be the deed of the corporation, which it purports to be. The seal is presumed to be the seal of the corporation, affixed by its authority, as in the case of a private person. The authority to execute the deed is of course essential to its validity; but so is the genuineness of the signature of the grantor in any case; and there seems to us as much reason to infer the one from the existence of the record copy as the other. The copy was admissible, because it purported to be the duly executed deed of the corporation, and was therefore presumed to be so; and the existence of all the facts necessary to make it so, is presumed as a consequence." [192]

Deeds should be acknowledged by the officer signing them as the deeds of the corporation.[193]

Statute of Frauds.

The statute of frauds requires contracts for the sale of lands or any interest therein to be in writing.[194] Under this statute

Pulsifer, 4 Allen, 165, it was held that a bond of the "A Insurance Company, by W. P. president of said company," signed "W. P. president," did not bind the president personally. Similarly as to assignments of mortgages, Murphy v. Welch, 128 Mass. 489, 491; Hutchins v. Byrnes, 9 Gray, 367. Cf. Com. v. Reading Savings Bank, 137 Mass. 431, 443.

[190] Brinley v. Mann, 2 Cush. 337 ("In witness whereof, I, C. C. Jr., in behalf of said company, and as their treasurer, have hereunto set my hand and seal. C. C. Jr. treasurer N. & S. Co.")

[191] See supra, under *o*.

[192] Chamberlain v. Bradley, 101 Mass. 188, 190, per Hoar, J.

[193] Brinley v. Mann, 2 Cush. 337, 340. As to the acknowledgment of deeds generally, see Hall on Examination of Land Titles, pp. 48–66.

[194] R. L., c. 74, § 1, cl. 4.

the recorded vote of a corporation, or of a committee acting upon a subject over which the committee has power, whether it be considered as an offer or as the acceptance of an offer, is a sufficient memorandum in writing.[195]

So also is an acceptance in writing and the placing in escrow of certain shares of stock and a deed of land until the payment for the land is completed.[196]

y. — Conveyance of all property or assets.[197]

Section 40 of the Act provides that a corporation may sell or exchange all its property and assets including its good will and franchise by a vote of two-thirds of all its stock outstanding and entitled to vote. This provision would seem to modify the common-law rule on the subject.

A conveyance of all property and assets, not expressly exempted from attachment, including different kinds of property and claims, and "all evidence thereof," passes title and the right to possession of the books of account of the corporation and the books of record of the meetings of its stockholders and directors down to the time of the conveyance.[198]

Where a new corporation is formed, which takes the assets of an old corporation, the creditors of the old corporation cannot maintain an action at law against the new one in the absence of a new contract to pay their debts.[199] And consequently, the new corporation cannot substitute itself for the old in contracts of the latter with third persons, unless there is some provision in the contracts making them assignable, or the third persons assent to the assignment.[200] Of course, in such a

[195] McManus v. Boston, 171 Mass. 152, 155; Chase v. Lowell, 7 Gray, 33; Johnson v. Trinity Church Society, 11 Allen, 123; Tufts v. Plymouth Gold Mining Co., 14 Allen, 407.

[196] Hibbard v. Hatch Storage Battery Co., 174 Mass. 276 (sale to corporation).

[197] As to the sale of merchandise in bulk, see supra, under *v*.

[198] Lothrop Pub. Co. v. Williams, 191 Mass. 361. If the corporation needed its books as evidence in any other matter, the courts would probably aid in compelling their production. Ibid.

[199] Ewing v. Composite Brake Shoe Co., 169 Mass. 72.

[200] New York Bank Note Co. v. Kidder Press Mfg. Co., 192 Mass. 391, 405; Boston Ice Co. *v.* Potter, 123 Mass. 28, 30.

case, any right of action for a breach of contract before the assignment, passes by it.[201]

z. Mortgage.[202]

As to bond mortgages, see infra, zd, and zk.

It is an implied power of a corporation to pledge or mortgage its property, apart from the authority given by the statute.

A public service corporation cannot, without authority, mortgage its franchise,[203] and, in any case, the franchise to be a corporation cannot be mortgaged.[204]

The form of execution of a mortgage is, in general, the same as for a deed or contract.[205] A mortgage of personal property need not be under seal,[206] but it is desirable to have the corporate seal appear on all formal contracts of the corporation.

A mortgage may be given to cover future advances as well as contemporaneous loans,[207] and may be drawn so as to cover after-acquired property.[208]

In order to hold after-acquired personal property as against subsequent vendees, mortgagees or attaching creditors, the

[201] New York Bank Note Co. v. Kidder Press Mfg. Co., 192 Mass. 391, 405.

[202] Fay v. Noble, 12 Cush. 1; Evans v. Boston Heating Co., 157 Mass. 37; Commonwealth v. Smith, 10 Allen, 448, 455. Cf. Hendee v. Pinkerton, 14 Allen, 381.

Historical. Pub. St., c. 106, § 23, required a vote of the stockholders for a conveyance, mortgage or lease for more than one year. See Saltmarsh v. Spaulding, 147 Mass. 224.

[203] Richardson v. Sibley, 11 Allen, 65; East Boston, etc., R. Co. v. Eastern R. Co., 13 Allen, 422; Commonwealth v. Smith, 10 Allen, 448; Shaw v. Norfolk, etc., R. Co., 5 Gray, 162, 180.

[204] Commonwealth v. Smith, 10 Allen, 448, 455; Hall v. Sullivan R. Co., 21 Law Rep. 138, 2 Redfield's Am. Ry. Cases, 621; Memphis R. Co. v. Commissioners, 112 U. S. 609, 619.

[205] See supra, under *x*, and infra, under *zi*.

[206] Milton v. Mosher, 7 Met. 244; Sherman v. Fitch, 98 Mass. 59.

[207] Jones v. Guaranty, etc., Co., 101 U. S. 622.

[208] See Toledo, etc., R. Co. v. Hamilton, 134 U. S. 296; Central Trust Co. v. Kneeland, 138 U. S. 414; Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 15; Farmers', etc., Trust Co. v. Commercial Bank, 15 Wis. 424; Pierce v. Emery, 32 N. H. 484; Farmers', etc., Trust Co. v. Long Beach, etc., Co., 27 Hun, 89; Allen v. Windham Cotton Co., 87 Fed. Rep. 786; Grape Creek Coal Co. v. Farmers', etc., Trust Co., 63 Fed. Rep. 896; Borden v. Croak, 131 Ill. 68.

original mortgagee must take possession of it before the rights of such persons attach. "A covenant or agreement in regard to after-acquired property will become effectual for the security of the mortgagee if he takes and keeps possession of the property under his mortgage, but not otherwise. Formerly it was thought that such a covenant would take effect only if the mortgagor, as well as the mortgagee, acted under it. Under the more liberal doctrine of later cases, which does not require delivery of the property by the mortgagor, it is well settled that, as against attaching creditors or assignees in insolvency, the title does not pass nor the mortgage take effect upon the after-acquired property, either at law or in equity, unless possession is taken under it." [209] But a provision that a mortgage shall cover after-acquired property is an executory agreement authorizing the mortgagee to take possession of the property before the rights of third parties attach, even though the mortgagor at the time of such taking possession was insolvent, and the mortgagee knew it.[210]

za. — Authority of officers to mortgage.

"It is not necessary that the authority should be given by a formal vote. Such an act by the president and general manager of the business of the corporation, with the knowledge and consent of the directors, or with their subsequent and long continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of a corporation may be inferred from the conduct of its officers or from their knowledge and neglect to make objection, as well as in the case of individuals." [211]

Where, however, the mortgage is of all the personal property of the corporation except its book accounts, it cannot be considered to be made as one of the ordinary incidents of carrying

[209] Harriman v. Woburn Electric Light Co., 163 Mass. 85, 87, per Knowlton, J.; Henshaw v. Bank of Bellows Falls, 10 Gray, 568, 571. Cf. Blanchard v. Cooke, 144 Mass. 207, 223; Bennett v. Bailey, 150 Mass. 257.

[210] Chase v. Denny, 130 Mass. 566; Moody v. Wright, 13 Met. 17. Cf. Howe v. Freeman, 14 Gray, 566, 571.

[211] Sherman v. Fitch, 98 Mass. 59, 64, per Hoar, J.; England v. Dearborn, 141 Mass. 590.

on a manufacturing business. Hence, in the absence of express authority or ratification, such a mortgage is invalid, even though made by the president and treasurer who was also general manager, and who owned all but two of the shares.[212]

As to mortgages of merchandise in bulk, not in the ordinary course of business, see also supra under v.

zb. — Mortgages by and to foreign corporations.

A foreign corporation, authorized to purchase and convey real estate, whose by-laws give the directors authority to manage its business, can mortgage its real estate without any vote of the stockholders.[213]

A foreign corporation, having a demand against a citizen of Massachusetts, on which an action can be maintained, may take a mortgage of his real estate.[214]

zc. — Mortgage of all property and assets.

Query, whether a mortgage of all the property and assets of a corporation requires the affirmative vote of two-thirds of the outstanding stock as provided in section 40 of the Act.

zd. — Issuing bonds.

Corporations may issue bonds secured by mortgage.[215]

ze. Lease.

Apart from express authority, a corporation may lease property unnecessary to the prosecution of its business;[216] and is

[212] England v. Dearborn, 141 Mass. 590, 592. See also Fay v. Noble, 12 Cush. 1; Lyndeborough Glass Co. v. Mass. Glass Co., 111 Mass. 315; Smith v. Smith, 117 Mass. 72; E. Carver Co. v. Manuf. Ins. Co., 6 Gray, 214; Titus v. Cairo, etc., R. Co., 8 Vroom, 98; Stokes v. New Jersey Pottery Co., 17 Vroom, 237.

[213] Saltmarsh v. Spaulding, 147 Mass. 224. Pub. St., c. 106, § 23 (R. L., c. 110, § 46), did not apply to foreign corporations. *Ibid.* See Beale, For. Corp., § 119.

[214] American Mut. Life Ins. Co. v. Owen, 15 Gray, 491.

[215] Commonwealth v. Smith, 10 Allen, 448. See infra, under *zk*.

[216] Brown v. Winnisimmet Co., 11 Allen, 326, 333; Nye v. Storer, 168 Mass. 53; Hendee v. Pinkerton, 14 Allen, 381.

Historical. Under Pub. St., c. 106, § 23, a corporation could not make a lease for more than one year except by a vote of the stockholders.

not restricted in leasing to others, to such a use as the corporation itself might make of the property.[217] It cannot, however, without authority, lease its franchise.[218]

The directors may delegate to a committee of their own number power to lease real estate, and "an authority to convey necessarily implies an authority to execute suitable and proper instruments for that purpose; and in case of a corporation to affix the corporate seal to an instrument requiring it." [219]

When duly authorized agents of a corporation take a lease running to the corporation and sign it individually, intending to take it on behalf of the corporation, and the latter ratifies their action, it is a valid lease to the corporation.[220] But if the agent takes the lease intending that the corporation shall occupy under him, and this fact is known to the lessor, the fact that the corporation so enters and occupies does not make it liable, and the agent alone is the lessee.[221]

zf. — To officers.

That a lease runs to persons who are directors is a suspicious circumstance which calls for careful scrutiny, but of itself does not render the transaction void.[222] "Such a lease may be made in good faith for the best interests of the corporation. It may be avoided or ratified by the corporation." [223]

zg. — Of all property and assets.

Query, whether a lease of all the property and assets of a corporation requires the vote of two-thirds of all the outstanding stock as provided in section 40 of the Act.

[217] Nye v. Storer, 168 Mass. 53.

[218] Middlesex R. Co. v. Boston & Chelsea R. Co., 115 Mass. 347.

[219] Burrill v. Nahant Bank, 2 Met. 163, 167, per Shaw, C. J.

[220] Carroll v. St. John's Society, 125 Mass. 565; Clark v. Gordon, 121 Mass. 330.

[221] Haley v. Boston Belting Co., 140 Mass. 73.

[222] Nye v. Storer, 168 Mass. 53, 55. Cf. Union Pacific R. R. v. Credit Mobilier, 135 Mass. 367, 376; Kelley v. Newburyport, etc., Railroad, 141 Mass. 496, 499.

[223] Nye v. Storer, 168 Mass. 53, 55.

zh. Contracts; liabilities; borrowing.[224]

Contracts in general.

"The power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is always implied where there is no positive restriction in the charter. Thus, it is not necessary that there should be express authority to borrow money, or to make negotiable paper, if such is the usual and proper means of accomplishing that object." [225]

A vote of the corporation is not itself a contract. "It is the act of the defendant [corporation] alone, and it requires the act of both parties to make a contract. The vote must have been communicated by the defendant to the plaintiff, and accepted by him, to constitute a contract between them. To make a vote of a corporation a contract binding on it, it is necessary, as in the case of a deed or promissory note, that there should be the offer of the obligation by the one party to the other, and its acceptance by the other. In the case of written instruments, the usual evidence of offer and acceptance is proof of the manual delivery of the instrument. There can be no actual delivery of a vote, and there need be no symbolical delivery of it, but to make a written vote binding as a promise, it must be communicated to the other party, that is, offered to him for his acceptance, and accepted by him, which is the equivalent of the delivery and acceptance of a written instrument. Proof that the writing was offered and accepted as a contract between the parties is equally necessary, whether the writing be a note or a deed. The fact that a party knows of and claims under a vote of a corporation,[226] may be *prima facie* proof that it was communicated to and accepted by him, as the posesssion of and claiming under a deed may be *prima facie* proof of its delivery and acceptance; but it is proof by oral

[224] As to contracts with promoters, see supra, chap. IV. As to contracts of sale, see supra, under *w*.

[225] Morville v. American Tract Society, 123 Mass. 129, 136, per Colt, J.; Old Colony R. Co. v. Evans, 6 Gray, 25, 39. See Davis v. Old Colony R. Co., 131 Mass. 258, 272.

[226] As in Delano v. Smith Charities, 138 Mass. 63.

evidence, and oral evidence is competent to control it, and to show that the vote was not communicated to the party, or that it was not accepted by him." [227]

Similarly, a vote of a corporation looking to the formation of a contract in the future is not usually a contract to make a contract.[228] But under special provisions of a charter, in the nature of eminent domain provisions, a vote may amount to a contract, the offer in such a case being supplied by the provisions in question.[229]

Contracts against public policy.

If a contract is in restraint of trade, it is void as being against public policy. But an agreement between manufacturers and a corporation formed by them, giving the latter the sole right to dispose of their product at a certain price for a certain period, and providing that they should not dispose of their patents so as to interfere with the agreement, is not objectionable on this ground.[230]

Contracts with officers.

Contracts made by a corporation acting through its board of directors with the directors as individuals are not necessarily void. The right to avoid such contracts may be waived. Where a contract has been made openly with the express or implied assent of the stockholders, the corporation and the stockholders cannot, in general, object.[231]

[227] Sears v. Kings County, etc., R. Co., 152 Mass. 151, 153, per W. Allen, J. Cf. Tufts v. Plymouth Gold Mining Co., 14 Allen, 407; Sargent v. Webster, 13 Met. 497.

[228] Edge Moor Bridge Works v. Bristol, 170 Mass. 528, 533; Dunham v. Boston, 12 Allen, 375 (cases of municipal corporations). Cf. Drummond v. Crane, 159 Mass. 577, holding there was an agreement to make a contract.

[229] Braintree Water Supply Co. v. Braintree, 146 Mass. 482, 487.

[230] Central Shade Roller Co. v. Cushman, 143 Mass. 353.

[231] As to this subject see infra, liability of directors for fraud, § 19, *d*; as to action by minority stockholders, see infra, § 24, *b*.

Implied contracts.[232]

A corporation may be liable upon an implied contract as well as upon an express contract.[233] Thus, where the same persons compose two corporations, and the latter partly executes a proposition made by one to the other, an acceptance may be inferred although no vote of the offeree was ever passed accepting the offer.[234]

zi. — Execution of corporate contracts.[235]

The proper form of corporation signature is the name of the corporation followed with the word "by" and the name or names of the officer or officers executing, with their title or titles.[236]

The name of the corporation may be written with a stamp,[237] or printed on the paper;[238] and in one case the corporation seal was held to take the place of a stamp.[239]

"The court has always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intentions of the parties."[240] Thus a draft, not naming the principal otherwise than by concluding "and charge the same to the Swanzey Paper Company, Yours respectfully, Joseph Hooper, Agent" was held the draft of the company."[241] So a draft with the name of the company printed in the margin, and concluding "which place to the account of the P. Iron Works, W. B. Agent," was held to bind the company.[242]

[232] See also Ratification of the Acts of Agents, infra, § 17, *m*.

[233] Smith v. First Cong. Meeting-House, 8 Pick. 178.

[234] Canal Bridge v. Gordon, 1 Pick. 197.

[235] Cf. execution of deeds by corporations, supra, under *e*.

[236] Miller v. Roach, 150 Mass. 140; Draper v. Massachusetts Steam Heating Co., 5 Allen, 338. Cf. Fuller v. Hooper, 3 Gray, 334; Abbott v. Shawmut Insurance Co., 3 Allen, 213.

[237] Miller v. Roach, 150 Mass. 140.

[238] Carpenter v. Farnsworth, 106 Mass. 561; Fuller v. Hooper, 3 Gray, 334; Slawson v. Loring, 5 Allen, 340, 343.

[239] Miller v. Roach, 150 Mass. 140.

[240] Carpenter v. Farnsworth, 106 Mass. 561, 562, per Gray, J.

[241] Tripp v. Swanzey Paper Co., 13 Pick. 291.

[242] Fuller v. Hooper, 3 Gray, 334. See Slawson v. Loring, 5 Allen, 340, 343.

So where a draft has the name of the corporation at the top, with the names of the agents and their office as agents printed in the margin, it is the draft of the corporation, even though signed by the agents personally.[243] So a mortgage of personal property, signed "G. S. president of the N. S. S. Co." is a good corporate contract, the corporation being named in the body of the instrument.[244] So an order addressed to the corporation and accepted "J. W. treas.", is an acceptance by the corporation.[245] So a note of a corporation, signed "A. B. Treas." of the corporation is a good note of the corporation.[246] So, of a contract signed by a committeee of a town, where the town is mentioned in the contract.[247] And in one case it was held that a note signed by "G. G. secretary" and "G. B. president," payable "to the order of ourselves," and endorsed "W. B. Co. G. B. prest. G. G. sec'ry," was the note of the corporation.[248]

But an instrument, in the body of which the corporation is not mentioned, signed "A. B. treas." or "A. B. treas. of C. Co," is not in proper form to bind the corporation, and frequently binds the officer personally.[249]

Where the name of the corporation has been omitted by mistake from the body of the instrument, and all parties to the transaction intended to bind the corporation, the mistake may be corrected by the insertion of the name.[250]

It may be observed that where the execution is not in proper form to bind the corporation by deed,[251] yet, as regards per-

[243] Chipman v. Foster, 119 Mass. 189.

[244] Sherman v. Fitch, 98 Mass. 59, 63. Cf. Fay v. Noble, 12 Cush. 1. As to assignments, see also Murphy v. Welch, 128 Mass. 489; Hutchins v. Byrnes, 9 Gray, 367.

[245] Rogers v. Union Stone Co., 134 Mass. 31, 37.

[246] Whitney v. Stow, 111 Mass. 368.

[247] Blanchard v. Blackstone, 102 Mass. 343, 347.

[248] Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577, 589.

[249] Davis v. England, 141 Mass. 587; Fullam v. West Brookfield, 9 Allen, 1; Draper v. Mass. Steam Heating Co., 5 Allen, 338; Fiske v. Eldridge, 12 Gray, 474; Bank of British N. America v. Hooper, 5 Gray, 567. Cf. contra, Mann v. Chandler, 9 Mass. 335.

[250] Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577, 589.

[251] As to which, see supra, under *x*.

sonal property, it may, when accepted, amount to a contract and cause the passing of title.[252]

zj. — Incurring liabilities and borrowing money.

Apart from statute, a corporation has the power to borrow money,[253] and to give its promissory note therefor.[254] And a bona fide holder, for value, who takes such a note before maturity, without knowledge that the maker did not receive full consideration, can enforce it although it was made for accommodation.[255]

But a corporation has no power to endorse notes for accommodation, and one who takes such a note with knowledge of the facts cannot enforce it against the corporation, even though the endorsement was made by authority of all the directors and of a majority of the stockholders.[256] And where one takes a note from the payee, endorsed by a corporation, the endorsement is *prima facie* for accommodation.[257]

zk. — Issuing bonds.[258]

"A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make con-

[252] Sargent v. Webster, 13 Met. 497, 503.

[253] Fay v. Noble, 12 Cush. 1; Kneeland v. Braintree, etc., Ry. Co., 167 Mass. 161; Bradbury v. Boston Canoe Club, 153 Mass. 77.

See also supra, under *z*.

[254] Narragansett Bank v. Atlantic Silk Co., 3 Met. 282; Bird v. Daggett, 97 Mass. 494; Monument National Bank v. Globe Works, 101 Mass. 57; Commonwealth v. Smith, 10 Allen, 448, 455; Merchants Bank v. Citizens Gas Light Co., 159 Mass. 505; Kneeland v. Braintree Street R. Co., 167 Mass. 161; Beacon Trust Co. v. Souther, 183 Mass. 413, 418.

See also cases supra, under *z* and *zd*; and under Powers of Treasurer, infra, § 17, *g*.

[255] Monument Nat. Bank v. Globe Works, 101 Mass. 57; Bird v. Daggett, 97 Mass. 494; Beacon Trust Co. v. Souther, 183 Mass. 413, 418; Merchants National Bank v. Citizens' Gas Light Co., 159 Mass. 505; Craft v. South Boston Railroad, 150 Mass. 207; J. G. Brill Co. v. Norton, etc., St. Ry., 189 Mass. 431, 437. Cf. Davis v. Old Colony R. Co., 131 Mass. 258; Ex parte Estabrook, 2 Lowell, 547, 548.

[256] Usher v. Raymond Skate Co., 163 Mass. 1; J. G. Brill Co. v. Norton, etc., St. Ry., 189 Mass. 431, 437.

[257] J. G. Brill Co. v. Norton, etc., St. Ry., 189 Mass. 431, 438; National Bank of Commonwealth v. Law, 127 Mass. 72. See Harrington v. Baker, 173 Mass. 488.

[258] As to convertible bonds, see also infra, § 32, *f*.

tracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement." [259]

A manufacturing or trading corporation may therefore issue bonds, and mortgage its property to secure them,[260] and a public service corporation may do the same when duly authorized.[261] But, in the absence of legislative authority, a public service corporation cannot do this; [262] and, where the bonds are invalid, a mortgage to secure them is invalid also.[263]

The terms of the trust mortgage must be carried out as agreed upon, and cannot be altered to the prejudice of persons who have relied upon them. Thus, where a mortgage contemplated the transfer to a trustee of stocks in other corporations owned by the mortgagor, it was held that the trustee could not be removed except in accordance with the terms of the trust agreement because the other corporations failed to perform their covenants, it not appearing that the trustee knew of such failure.[264] So also where a mortgage gave certain holders of debentures previously issued the privilege of exchanging them for mortgage bonds, it was held that one, who deposited his debentures prior to a vote revolving the privilege, was entitled to the exchange.[265]

It is desirable that such an important matter as the mortgaging of property to secure a bond issue should be acted on by the stockholders.

[259] Commonwealth v. Smith, 10 Allen, 448, 455, per Hoar, J.

[260] Commonwealth v. Smith, 10 Allen, 448, 455; Evans v. Boston Heating Co., 157 Mass. 37, 41; Harriman v. Woburn Electric Light Co., 163 Mass. 85; Henshaw v. Bank of Bellows Falls, 10 Gray, 568. Cf. Shepard v. Richardson, 145 Mass. 32; Foster v. Boston, 133 Mass. 143; Merchants' Nat. Bank v. Greene, 150 Mass. 317.

[261] East Boston, etc., R. Co. v. Eastern R. Co., 13 Allen, 422; Chapin v. Vermont, etc., R. Co., 8 Gray, 575.

[262] Commonwealth v. Smith, 10 Allen, 448; Richardson v. Sibley, 11 Allen, 65; East Boston, etc., R. Co. v. Eastern R. Co., 13 Allen, 422.

[263] Commonwealth v. Smith, 10 Allen, 448, 458.

[264] Dillaway v. Boston Gas Light Co., 174 Mass. 80.

[265] Wakefield Water Co. *v.* The New England Trust Co., 175 Mass. 478. Cf. also as to debentures, Falmouth Bank v. Cape Cod Ship Canal Co., 166 Mass. 550.

— **Statutory provisions. (1) Registration of bonds, etc.**

"Any corporation organized under the laws of this commonwealth may, at the request of the holder of a bond, promissory note or certificate of indebtedness issued by it, payable to bearer, at any time more than one year before maturity thereof, issue in exchange therefor a bond, note or certificate of the same effect payable to the owner or holder by name." [266]

"A person to whom a bond, note or certificate issued under the preceding section is transferred by operation of law or by assignment acknowledged before an officer authorized to take acknowledgments of deeds conveying real property in this commonwealth, shall be entitled in exchange therefor to a new bond, note or certificate of the same effect, payable to him by name." [267]

"Such . . . corporation shall keep a register showing the number, date, amount and rate of interest of each bond, promissory note or certificate of indebtedness issued by it under the provisions of the two preceding sections; of the time when payable and the name of the payee; and of the bonds, notes or certificates, if any, received in exchange therefor; and shall be entitled to a fee of fifty cents for each bond, note or certificate so registered." [268]

(2) Redemption of bonds, etc.

"No person or corporation shall issue, negotiate or sell any bonds, certificates or obligations of any kind, which are by the terms thereof to be redeemed in numerical order or in any arbitrary order of precedence without reference to the amount previously paid thereon by the holder thereof, whether they are sold on the instalment plan or otherwise. No person or corporation shall redeem any bonds, certificates or obligations of any kind in numerical order or in any arbitrary order of precedence without reference to the amount previously paid thereon by the holder thereof, whether they are sold on the instalment plan or otherwise." [269]

"Whoever violates the provisions of the preceding section shall for each offense be punished by a fine of not more than two thousand dollars, or by imprisonment for not more than one year. Such violation by a domestic corporation shall operate as a forfeiture of its franchise; and such violation by a foreign corporation, association or organization shall operate as a discontinuance of its right to do business in this Commonwealth, and the supreme judicial court or the superior court, upon the application of the

[266] R. L., c. 73, § 4; Pub. St., c. 77, § 5; St. 1876, c. 238, § 1.

[267] R. L., c. 73, § 5; Pub. St., c. 77, § 6; St. 1876, c. 238, § 2. Cited in Scollans v. Rollins, 179 Mass. 346, 351.

[268] R. L., c. 73, § 6; Pub. St., c. 77, § 7; St. 1876, c. 238, § 3.

[269] St. 1905, c. 454, § 1; R. L., c. 73, § 7; St. 1891, c. 382, § 1. Cited in Attorney-General v. Pitcher, 183 Mass. 513, 516; Attorney-General v. Preferred Mercantile Co., 187 Mass. 516, 520.

commissioner of corporations, shall have jurisdiction in equity to enjoin such foreign corporation, association or organization from further continuing its business in this Commonwealth. The court may appoint a receiver to take possession of the property of such corporation, association or organization, and to close up the business subject to the order of the court." [270]

These two sections are a reasonable exercise of the police power and are constitutional.[271] Obligations are redeemable in numerical order when they are to be paid in the order of their issue whenever enough money is received from new obligations issued, even though the actual numbering is not consecutive.[272]

The proper remedy for violation of these provisions is an information by the attorney-general in the nature of a *quo warranto*,[273] but not where the acts sought to be enjoined affect only individual purchasers.[274]

(3) Rate of interest on bonds.

"No bond issued by a corporation shall bear interest at a yearly rate exceeding seven dollars upon each hundred." [275]

(4) Negotiability of bonds.

Under the present law bonds are negotiable, if payable to bearer or to the registered holder thereof.[276]

The statute has been liberally construed, and a bond payable to ——— is held negotiable.[277]

[270] St. 1905, c. 454, § 2; R. L., c. 73, § 8; St. 1891, c. 382, §§ 2–4. Cited in Attorney-General v. Pitcher, 183 Mass. 513, 516; Attorney-General v. Preferred Mercantile Co., 187 Mass. 516, 520, 521.

[271] Atty.-Gen. v. Preferred Mercantile Co., 187 Mass. 516, 520.

[272] Atty.-Gen. v. Preferred Mercantile Co., 187 Mass. 516.

[273] Atty.-Gen. v. Preferred Mercantile Co., 187 Mass. 516. Cf. Attorney-General v. Salem, 103 Mass. 138, 139; Campbell v. Talbot, 132 Mass. 174, 177; Attorney-General v. Sullivan, 163 Mass. 446.

[274] Atty.-Gen. v. Pitcher, 183 Mass. 513.

[275] R. L., c. 73, § 3; Pub. St., c. 77, § 3; St. 1870, c. 292; Gen. St., c. 63, § 120; St. 1854, c. 286, § 2.

[276] R. L., c. 73, § 23; St. 1898, c. 533, § 6; Pub. St., c. 77, § 4; Gen. St., c. 53, § 6; St. 1852, c. 76; Strauss v. United Telegram Co., 164 Mass. 130.

[277] Chapin v. Vermont, etc., R. Co., 8 Gray, 575; White v. Vermont, etc., R. Co., 21 How. 575. Cf. Haven v. Grand Junction R. Co., 109 Mass. 88, 96; Union Cattle Co. v. International Trust Co., 149 Mass. 492.

(5) Taxation of bonds.

Under the statutes, the amount of a mortgage of real estate to secure an issue of bonds is taxable to the mortgagee as real estate, and the holders of the bonds are not taxable for them as personal property, even though the mortgage is made to a trustee,[278] except as to any excess in the value of the bonds over the real estate subject to the mortgage.[279] They are taxable for such excess, irrespective of the party to whom the mortgagee's interest is actually assessed.[280]

But these statutes do not apply where the mortgage covers land in other states as well as land in the Commonwealth, and, a fortiori, where the mortgage covers also personal property, the value of which is not stated.[281]

zl. Ultra vires acts. — Generally.[282]

As we have seen,[283] a corporation has no powers except those given to it. In addition to its main business, "it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created."[284] And the powers originally given to it may be changed or increased by legislation, with the assent of the corporation.[285]

"Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its

[278] R. L., c. 12, §§ 4, 16–18. Knight v. Boston, 159 Mass. 551 (Boston Water Power Co.); Brooks v. West Springfield, 193 Mass. 190 (Am. Writing Paper Co.).

[279] Op. Atty.-Gen., March 8, 1906.

[280] Op. Atty.-Gen., March 8, 1906.

[281] Brooks v. West Springfield, 193 Mass. 190. Cf. Harriman v. Woburn Electric Light Co., 163 Mass. 85, 87.

[282] As to when a corporation is bound by the acts of its officers and agents, see infra, § 17.

[283] Supra, *a*.

[284] Brown v. Winnisimmet Co., 11 Allen, 326, 334, per Bigelow, C. J.; Morville v. American Tract Society, 123 Mass. 129, 136; Flaherty v. Benevolent Society, 99 Me. 253.

[285] Durfee v. Old Colony R. Co., 5 Allen, 230, 244–246.

capacity,[286] and if that capacity is exceeded there can be no recovery upon the contract with the corporation." [287]

But there is a distinction "between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, where such abuse or failure is not known to the other contracting party." [288] "When the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply." [289]

Of course, where the other party has notice of a failure to comply with regulations, as where they appear upon a stock certificate or contract, the general rule applies.[290]

Where a contract has been entered into to do something which the corporation was not at the time authorized to do, but statutory authority is obtained later, and that authority is recognized, the original contract is valid and binding.[291]

Where the contract in question is valid, the fact that the corporation is acting ultra vires in other respects is, of course, immaterial.[292]

[286] Davis v. Old Colony R. Co., 131 Mass. 258, 260, per Gray, C. J.; Davis v. Smith American Organ Co., 131 Mass. 258, 276; Whittenton Mills v. Upton, 10 Gray, 582, 598.

[287] In Davis v. Old Colony R. Co., 131 Mass. 258, it was held that a railroad could not guarantee the expenses of a musical festival; and in Davis v. Smith American Organ Co., 131 Mass. 258, 276, the same was held with respect to a corporation manufacturing organs.

[288] Davis v. Old Colony R. Co., 131 Mass. 258, 260, per Gray, C. J.; Slater Woollen Co. v. Lamb, 143 Mass. 420, 421.

[289] Monument Nat. Bank v. Globe Works, 101 Mass. 57, 58, per Hoar, J., holding that the holder in good faith and for value of an accommodation note, who took it before maturity and without knowledge that it was made for accommodation, could enforce it. See supra, *under z*.

[290] Badger v. American, etc., Ins. Co., 103 Mass. 244 (where a policy provided it was not to be valid until countersigned by a certain person); Boynton v. Lynn Gas Light Co., 124 Mass. 197 (contract under seal).

[291] New Haven, etc., Co. v. Hayden, 107 Mass. 525.

[292] See Sargent v. Boston & Lowell R. Co., 115 Mass. 124; McCluer v.

zm. — What acts are ultra vires.

The following acts have been held to be ultra vires:

(1) Attempting to increase or diminish the capital stock or the number of shares, except in the manner provided by law.[293]

(2) Selling or mortgaging its franchise as a public service corporation without authority.[294]

(3) Guaranteeing, by a railroad or a corporation making musical instruments, of the expenses of a musical festival.[295]

(4) The forming of a partnership with an individual by a manufacturing corporation; for that places the management of the business of the corporation in the hands of individuals who are not members or officers of the corporation.[296]

(5) Taking private property without the consent of the owner or legislative authority.[297]

(6) Trespassing on private property without the consent of the owner.[298]

(7) Digging, by a water company, of wells, in such a way as to intercept underground currents of water.[299]

(8) Exercising powers not granted to it, though granted by special act to a company most of the stock of which it owns.[300]

(9) Contracting by a national bank, to supply a person with fire insurance in exchange for procuring new customers.[301]

Manchester & Lawrence R. R., 13 Gray, 124. Cf. Kelley v. Newburyport, etc., R. Co., 141 Mass. 496, where a corporation attempted to escape liability for its notes on the ground that it had not complied with the statute as to payment of capital.

[293] Salem Mill Dam v. Ropes, 6 Pick. 23.

[294] See supra, *w* and *x*.

[295] Davis v. Old Colony R. Co., 131 Mass. 258; Davis v. Smith American Organ Co., 131 Mass. 258, 276.

[296] Whittenton Mills v. Upton, 10 Gray, 596. Cf. Kelly v. Biddle, 180 Mass. 147.

[297] Thacher v. Dartmouth Bridge, 18 Pick. 501; Pickman v. Peabody, 145 Mass. 480.

[298] Perry v. Wilson, 7 Mass. 393. Cf. Hood v. Dighton Bridge, 3 Mass. 263.

[299] Atty.-Gen. v. Jamaica Pond Aqueduct Co., 133 Mass. 361. Cf. Proprietors of Mills v. Braintree Water Supply Co., 149 Mass. 478, 484; Hart v. Jamaica Pond Aqueduct Co., 133 Mass. 488; Potter v. Howe, 141 Mass. 357.

[300] French v. Connecticut River Lumber Co., 145 Mass. 261.

[301] Dresser v. Traders' Nat. Bank, 165 Mass. 120.

(10) Compromising with stockholders the amount of an assessment on the stock, to the prejudice of creditors.[302]

(11) Misappropriating land taken by eminent domain for railroad purposes, by leasing to private traders.[303]

(12) Leasing, by a public service corporation of its street railroad and franchises.[304]

(13) Endorsing paper for accommodation.[305]

The following acts have been held not to be ultra vires:[306]

(1) Acquiring the title to land by disseisin and adverse possession, by a corporation authorized to take possession of land.[307]

(2) Purchasing land, erecting an exhibition hall and mortgaging other land for these purposes, by a corporation authorized to hold land, appropriate funds to charitable purposes, promote inventions, etc.[308]

(3) Taking shares of other corporations in payment of debts.[309]

(4) Temporarily purchasing from others articles which the corporation is formed to manufacture, until its works are put in repair.[310]

(5) Leasing, by a steamboat company, to another, a hotel purchased by it, even if the purchase was ultra vires.[311]

(6) Letting, by a ferry company, of one of its boats by the day, if not needed for its ferry service.[312]

[302] Anglo-American, etc., Co. v. Dyer, 181 Mass. 593, 598; Sawyer v. Hoag, 17 Wall. 610.

[303] Proprietors of Locks v. Nashua, etc., R. Co., 104 Mass. 1. Cf. New Haven, etc., Co. v. Hayden, 107 Mass. 525; Portage Co. Supervisors v. Wisconsin Central R. Co., 121 Mass. 460.

[304] Middlesex R. Co. v. Boston, etc., R. Co., 115 Mass. 347.

[305] See supra, under *zj*.

[306] For other lawful acts see also the various headings under this section of the act.

[307] Rehoboth Precinct v. Rehoboth Congregational Society, 23 Pick. 139.

[308] Richardson v. Massachusetts Charitable Mechanics Assoc., 131 Mass. 174.

[309] Howe v. Boston Carpet Co., 16 Gray, 493. Cf. supra, under *r*.

[310] Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315.

[311] Nantasket Beach Steamboat Co. v. Shea, 182 Mass. 147.

[312] Brown v. Winnisimmet Co., 11 Allen, 326. Cf. Proprietors of Locks v. Nashua, etc., R. Co., 104 Mass. 1, cited supra.

(7) Arranging for a trial at its expense, by a gas company, of a new process of manufacture.[313]

(8) Raising, by a water company of the water of certain ponds, although land between the dam and the ponds is outside the Commonwealth.[314]

(9) Suing for groceries sold by its undisclosed agent, by a woollen manufacturing company, even if the sale was ultra vires.[315]

(10) Guaranteeing, by a finance corporation, a bond of another corporation sold by it.[316]

(11) Suing, by a finance corporation on commercial paper purchased by it, even though such purchase was ultra vires.[317]

(12) Making promissory notes.[318]

(13) Receiving, by a religious and educational corporation, of money on condition to return it if an additional amount is not raised within a certain time.[319]

(14) Borrowing money, by an athletic club, to build a club-house on leased land.[320]

(15) Making a contract in the course of business, although the capital had not been paid in as required by Pub. St., c. 106, § 46.[321]

(16) Contracting, by the assignee of an insolvent corporation to pay the debt of a creditor out of the proceeds of certain property in consideration of the creditors releasing an attachment.[322]

(17) Conducting, by a corporation formed to develop land

[313] Marlborough Gas Light Co. v. Neal, 166 Mass. 217.

[314] Phillips v. Watuppa Reservoir Co., 184 Mass. 404.

[315] Slater Woollen Co. v. Lamb, 143 Mass. 420. To the same effect, as to a sale of general merchandise, Chester Glass Co. v. Dewey, 16 Mass. 94, 102.

[316] Broadway National Bank v. Baker, 176 Mass. 294, 298.

[317] Little v. O'Brien, 9 Mass. 423; National Pemberton Bank v. Porter, 125 Mass. 333; Atlas National Bank v. Savery, 127 Mass. 75.

[318] See supra, *zj*.

[319] Morville v. American Tract Society, 123 Mass. 129.

[320] Bradbury v. Boston Canoe Club, 153 Mass. 77.

[321] Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428.

[322] International Trust Co. v. Boardman, 149 Mass. 158.

by selling and leasing lots, a spiritualist camp meeting ground.[323]

zn. — By whom objection of ultra vires may be raised. Ultra vires contracts void.

Although a given act may be ultra vires, it does not follow that the act is not the act of the corporation, or that rights and liabilities may not flow from it.

If an ultra vires contract has been fully performed on both sides, the courts will, in general, not interfere, but will leave the parties *in statu quo*.[324] So, if the contract has not been at all executed on either side;[325] and neither party can compel specific performance nor sue for damages for failure of the other party to perform.[326]

The same rule is applied, in this Commonwealth and some other states, to cases where the contract has been executed on one side, and the other party sues upon the contract;[327] although it is also said that where a corporation has received and retained the consideration for a contract, and the latter is unobjectionable in other respects, the corporation will not be allowed to set up the defense of ultra vires, when such a course must work a positive injury to the plaintiff.[328] In

[323] Nye v. Whittemore, 193 Mass. 208.

[324] First Nat. Bank v. Stewart, 107 U. S. 676; Union Trust Co. v. Illinois, etc., R. Co., 117 U. S. 468; National Pemberton Bank v. Porter, 125 Mass. 333; Attleborough Nat. Bank v. Rogers, 125 Mass. 339.

[325] Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24; Thomas v. West Jersey R. Co., 101 U. S. 71; Davis v. Old Colony R. Co., 131 Mass. 258; Nims v. Mount Hermon Boys' School, 160 Mass. 177, 179.

[326] Ashbury, etc., Iron Co. v. Riche, L. R., 7 H. L. 653; Thomas v. West Jersey R. Co., 101 U. S. 71; Downing v. Mt. Washington Road Co., 40 N. H. 230. See Brunswick Gas Light Co. v. United Gas, etc., Co., 85 Me. 532.

[327] Davis v. Old Colony R. Co., 131 Mass. 258; Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24; Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co., 131 U. S. 371; Brunswick Gas Light Co. v. United Gas, etc., Co., 85 Me. 532; Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43. Contra, Whitney Arms Co. v. Barlow, 63 N. Y. 62; Camden, etc., R. Co. v. May's Landing, etc., R. Co., 48 N. J. L. 530.

[328] New York Bank Note Co. v. Kidder Press Mfg. Co., 192 Mass. 391;

other words, a corporation may be equitably estopped to set up the defense of ultra vires.

Recovery in quasi-contract where contract executed by one party.

Where a corporation sets up the defense of ultra vires, it is liable to make restitution of what it has received under the contract upon an implied promise;[329] and on the same principle where a corporation has supplied goods or performed services, the other party is liable in quasi-contract for their value and cannot set up ultra vires as a defense.[330]

Defense does not apply where an abuse of apparent authority.

As we have seen,[331] persons contracting with a corporation are bound to take notice of the legal limits of its capacity. Where, however, the contract is an abuse, in a particular instance, of a power which the corporation has, as distinguished from an exercise of a power it has not, there is usually nothing to put the other party upon inquiry; and, in such a case, the doctrine of ultra vires does not apply.

This is true, for example, in the case of one taking accommodation paper made or endorsed by the corporation, before maturity, without notice that it is merely accommodation paper. Such a holder can enforce it against the corporation.[332]

Slater Woollen Co. v. Lamb, 143 Mass. 420, 421; Prescott National Bank v. Butler, 157 Mass. 548, 549; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 179.

[329] White v. Franklin Bank, 22 Pick. 181; Dill v. Wareham, 7 Met. 438; Morville v. American Tract Society, 123 Mass. 129; Whitney v. Leominster Savings Bank, 141 Mass. 85; Nashua, etc., R. Co. v. Boston & Lowell R. Co., 164 Mass. 222; L'Herbette v. Pittsfield Nat. Bank, 162 Mass. 137. Cf. Kelley v. Newburyport, etc., Co., 141 Mass. 496.

[330] Slater Woollen Co. v. Lamb, 143 Mass. 421; Chester Glass Co. v. Dewey, 16 Mass. 94; Kelly v. Biddle, 180 Mass. 147. Cf. Brunswick Gas Light Co. v. United Gas, etc., Co., 85 Me. 532; Manchester, etc., R. Co. v. Concord R. Co., 66 N. H. 100; United Lines Telegraph Co. v. Boston Safe Deposit, etc., Co., 147 U. S. 431; Attleborough Nat. Bank v. Rogers, 125 Mass. 339.

[331] Supra, *zl.*

[332] Monument Nat. Bank v. Globe Works, 101 Mass. 57; Bird v. Daggett,

Defense not available in actions of tort.

Where a corporation commits a tort in the course of conducting an ultra vires business, it cannot set up the defense of ultra vires to escape liability.[333]

Contracts partly ultra vires.

If the contract is valid in part, and ultra vires as to part, the former may be enforced if separable from the latter.[334]

Pleading.

In any proceeding in equity affecting seriously the interests of a corporation, no decree can be made on the ground of ultra vires unless the corporation has been made a party to the suit.[335]

20. — Restraint of ultra vires acts.

(1) By the State.

It is provided by statute that "upon an information in equity in the name of the attorney-general, at the relation of the commissioner of corporations, the supreme judicial court shall have power to restrain by injunction any corporation from assuming or exercising any franchise or privilege or transacting any kind of business not authorized by the charter of such corporation and the laws of this Commonwealth." [336]

Apart from this statute, a corporation doing acts which create a public nuisance may be restrained upon an information by the attorney-general.[337]

97 Mass. 494; Beacon Trust Co. v. Souther, 183 Mass. 413, 418. Cf. Connecticut Savings Bank v. Fiske, 60 N. H. 363; Nat. Bank of Republic v. Young, 41 N. J. Eq. 531.

[333] Nims v. Mount Hermon Boys' School, 160 Mass. 177; Bissell v. Michigan Southern, etc., R. Co., 22 N. Y. 258.

[334] Hendee v. Pinkerton, 14 Allen, 381 (where a corporation included in a mortgage certain property which it had no right to mortgage).

[335] Price v. Minot, 107 Mass. 49, 63.

[336] St. 1906, c. 372, in effect May 8, 1906. Formerly an information could not be brought unless public or private rights were injured or endangered by the acts of the corporation. Atty.-Gen. v. Tudor Ice Co., 104 Mass. 239.

[337] Atty.-Gen. v. Cambridge, 16 Gray, 247; Atty.-Gen. v. Jamaica Pond Aqueduct Co., 133 Mass. 361; Dist. Atty. v. Lynn & Boston R. Co., 16 Gray, 242; Atty.-Gen. v. Boston Wharf Co., 12 Gray, 553.

Except in cases of public nuisance or public charitable trusts, the method of compelling a corporation to perform a statutory duty is by mandamus and not by *quo warranto*.[338] But an information in the nature of *quo warranto* will lie against a corporation usurping a franchise.[339]

(2) By stockholders.

Stockholders may have a remedy in equity to restrain ultra vires acts injurious to the corporation and to their interests.[340]

§ 5. Corporate name.[341]

"A corporation which is organized under general laws may assume any name which shall indicate that it is a corporation as distinguished from a natural person or a partnership; but it shall not assume the name of another domestic corporation, or of a foreign corporation, or of any partnership or association, carrying on business in this commonwealth at the time of such organization or within three years prior thereto, or a name so similar thereto as to be liable to be mistaken for it, except with the consent in writing of such existing corporation, association or partnership filed with the articles of organization. The supreme judicial court or the superior court shall have jurisdiction in equity, upon the application of any corporation, partnership, association or person interested or affected, to enjoin such corporation from doing business under a name assumed in violation of the provisions of this section although its articles of organization may have been approved and a certificate of incorporation may have been issued to it." [342]

[338] Atty.-Gen. v. Boston, 123 Mass. 460; Atty.-Gen. v. Salem, 103 Mass. 138.

[339] Campbell v. Talbot, 132 Mass. 174. As to quo warranto generally, see supra, under *k*.

[340] See infra, § 19, *d*, *e*, and § 24, *b*.

[341] As to change of name, see infra, § 40.

[342] St. 1903, c. 437, § 5; R. L., c. 110, § 16; c. 109, § 8; St. 1894, c. 522, § 30; St. 1888, c. 413, § 27; St. 1887, c. 214, § 30; St. 1883, c. 98, § 1; Pub. St., c. 119, § 28; c. 117, § 3; c. 106, § 17; St. 1877, c. 224, § 3; St. 1875, c. 225; St. 1872, c. 375, § 5; St. 1870, c. 224, § 8; Gen. St., c. 61, § 1; St. 1851, c. 133, § 6; St. 1891, c. 257.

Citations. — St. 1883, c. 98, § 1: Atwood v. Dumas, 149 Mass. 168, 21 N. E. Rep. 236; Jewett v. West Somerville, etc., Bank, 173 Mass. 56.

a. Generally.

The purpose of the statute is to prevent the identity of corporate names which would result in endless mistakes and confusion.[343] Query, whether a corporation can exist under the statute without any corporate name.[344] It would seem that the spirit of the statute requires the adoption of some name, else there might be confusion between several unnamed corporations.

The certificate issued by the government is conclusive, as against private individuals, of the right of the corporation to the use of the names set forth therein.[345] Where the State proceeds against a corporation for being incorporated under an improper name, query, whether the proceeding should not be for a forfeiture of the entire franchise.[346] The usual course of procedure where a corporation or persons claiming to be a corporation injure the private right of another by the exercise of a franchise or privilege not conferred by law, is for the party injured to apply to the Supreme Judicial Court for leave to file an information in the nature of a quo warranto;[347]

Pub. St., c. 106, § 17: Boston Rubber, etc., Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875; American Order of Scottish Clans v. Merrill, 151 Mass. 560, 24 N. E. Rep. 918.

St. 1870, c. 224, § 8: First Nat. Bank of Salem v. Almy, 117 Mass. 478; Boston Rubber, etc., Co. v. Boston Rubber Co., 149 Mass. 439, 21 N. E. Rep. 875; American Order Scottish Clans v. Merrill, 151 Mass. 560, 24 N. E. Rep. 918.

Gen. St., c. 61, § 1: Peele v. Phillips, 8 Allen, 88; Merrick v. Reynolds, etc., Co., 101 Mass. 383; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394; Hittinger v. Eames, 121 Mass. 539; Hudson v. J. B. Parker Machine Co., 173 Mass. 242, 53 N. E. Rep. 867.

St. 1851, c. 133, § 6: Dooley v. Cheshire Glass Co., 15 Gray, 496; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394.

[343] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875. Cf. American Order of Scottish Clans v. Merrill, 151 Mass. 558, 24 N. E. Rep. 918.

[344] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875. That it cannot: Thomas v. Dakin, 22 Wend. 9.

[345] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875; American Order of Scottish Clans v. Merrill, 151 Mass. 558, 24 N. E. Rep. 918.

[346] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875.

[347] See R. L., c. 192, § 6. Boston Rubber Shoe Co. v. Boston Rubber

but the equity jurisdiction in this section as to names was expressly conferred in 1891,[348] although it existed before.[349] The use by a corporation of the name of another in violation of law cannot be set up by the corporation to defeat an action against it by a creditor.[350]

The mere fact that there is a mistake in the name of a corporation does not make void a contract to which it is a party.[351]

b. Name should indicate incorporation.

The name of a corporation should indicate that it is an incorporated body, and not a partnership. The use of any one of the words "company," "corporation," or "incorporated" is held to be sufficient for this purpose. The word "limited," even following the name of a firm is held to indicate a corporation, as it is not commonly employed to designate a limited partnership.

c. Trade names.

Either an individual, a corporation or a partnership may do business under a name which would appear to be the name of a corporation or firm, but is not in fact the true name of the party using it. Such a name is called a "trade name."

So, too, a body corporate may be known by different names,[352] and a variance from the corporate or charter name is immaterial provided there be no question as to identity, a question which is to be settled upon inquiry into facts and circumstances.[353]

Co., 149 Mass. 436, 21 N. E. Rep. 875; Rice v. National Bank, 126 Mass. 300.

[348] St. 1891, c. 257, in effect April 28, 1891.

[349] American Order Scottish Clans v. Merrill, 151 Mass. 558, 24 N. E. Rep. 918.

[350] Dooley v. Cheshire Glass Co., 15 Gray, 494.

[351] Hoboken Building Ass'n v. Martin, 13 N. J. Eq. 427.

[352] Minot v. Curtis, 7 Mass. 441; Gifford v. Rockett, 121 Mass. 431.

[353] Gifford v. Rockett, 121 Mass. 431; Medway Cotton Manufactory v. Adams, 10 Mass. 360; Commercial Bank v. French, 21 Pick. 486, 491; Tucker v. Seamans' Aid Society, 7 Met. 188, 209. Cf. on the point that paper made in the name of an officer may be sued on by him although the beneficial interest be in the corporation: Fisher v. Ellis, 3 Pick. 322; Fairfield v. Adams, 16 Pick. 381; Little v. Obrien, 9 Mass. 423; Brigham v. Morgan, 7 Pick. 40.

Thus where a note made to the "Medway Cotton Manufactory" by the name of "Richardson, Metcalf & Co.", it was held the corporation could recover upon it;[354] and where a note was made payable to the cashier of a bank and the consideration proceeded from the bank, it was held the bank could sue upon it.[355] So an assignment by the "Fall River Print Works" under the name of the "Robeson Print Works" was held valid in trustee process.[356]

The question sometimes arises how far individuals may incorporate under a name identical with the trade name used by some older corporation. The object of the statute is not to prevent the fraudulent use of trade names, but the identity of corporate names.[357] A corporation may acquire a right to the exclusive use of a name other than its corporate name, as a trade name, but not as a corporate name.[358] On the other hand, where a corporation takes its official name, it does so subject to whatever interference by subsequent corporations may be permitted under the statute; and the mere fact that its corporate name has also acquired importance in a business way gives no additional rights of protection.[359]

In every case the discretion to allow the use of a name rests with the Commissioner of Corporations,[360] who may approve a name adopted in the agreement of association, although such name is already in use as a trade name by an existing corporation of a different corporate name.[361] Where a corporation had a name similar to the trade name used by an older cor-

[354] Medway Cotton Manufactory v. Adams, 10 Mass. 360.

[355] Commercial Bank v. French, 21 Pick. 486, 491.

[356] Gifford v. Rockett, 121 Mass. 431.

[357] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875.

[358] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875.

[359] American Order Scottish Clans v. Merrill, 151 Mass. 558, 24 N. E. Rep. 918.

[360] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875. Cf. as to the authority of the Insurance Commissioner, American Order Scottish Clans v. Merrill, 151 Mass. 558, 562, 24 N. E. Rep. 918.

[361] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875.

poration, and for several years carried on a business in a different line of the same business in which the older corporation was engaged, and no serious inconvenience resulted, although letters and packages sometimes were sent to the wrong party, and the younger corporation began the same line of business as the older corporation and the use of its corporate name in such business, it was held that no interest of the older was threatened, and that a petition for leave to file an information in the nature of a quo warranto must be dismissed.[362]

d. Corporation cannot adopt misleading name.

The general principle as to trade names is that where one has adopted a certain name in his business, another will not be allowed to adopt even his own name, or the name of his locality, in such a way as to pass off his goods upon the public as the goods of the former.[363] If, in fact, the defendant is passing off his goods as those of the plaintiff, his use of the name will be restrained, although in fact there was no intent to deceive.[364]

But where, although the corporate names of two corporations are almost identical, the junior adds certain distinguishing words to its name and uses this phrase as a trade name, an injunction will be limited only to its use of its corporate name.[365]

e. Right to use name of corporation.

A sale of the good will of the business of a corporation includes the right to the trade name used in its business;[366] and

[362] Ibid. Cf. Converse v. Hood, 149 Mass. 471. For a case where one agreed to purchase stock in a West Virginia corporation and was tendered stock in a Connecticut corporation of the same name, see Craig Silver Co. v. Smith, 163 Mass. 262.

[363] American, etc., Watch Co. v. U. S. Watch Co., 173 Mass. 85; Viano v. Baccigalupo, 183 Mass. 160; New England Awl, etc., Co. v. Marlborough Awl, etc., Co., 168 Mass. 154, 156; Singer Mfg. Co. v. June M'f'g Co., 163 U. S. 169, 204; Flagg Manuf. Co. v. Holway, 178 Mass. 83; Russia Cement Co. v. Le Page, 167 Mass. 222; Samuels v. Spitzer, 177 Mass. 226.

[364] Viano v. Baccigalupo, 183 Mass. 160, 164; Cellular Clothing Co. v. Maxton, [1899] A. C. 326, 334.

[365] International Trust Co. v. International Loan & Trust Co., 153 Mass. 271.

[366] Lothrop Pub. Co. v. Lothrop, etc., Co., 191 Mass. 353.

such right passes by a general assignment for the benefit of its creditors.[867]

f. Registration of trade names.

A recent act provides, under a penalty of not over one hundred dollars per month, that "any person or persons conducting or transacting business in this commonwealth under any name, designation or title other than the real name or names of the person or persons conducting or transacting such business, whether individually, or as a firm or partnership, shall file in the office of the clerk of the city or town in which the place or places of business or office or offices of any such person, firm or partnership may be situated, a certificate stating the full name and residence of each person engaged in or transacting such business. The clerk shall keep a record of such certificates, and an index of the names of such persons, firms and partnerships, entering in such index in alphabetical order the name of every person and the title under which he does business, and of every firm or partnership and the names of the members thereof." [868]

This act applies to an individual or a firm using a name indicating that the business is conducted by a corporation. It is expressly provided that "this act shall not apply to any corporation doing business under its true corporate name." [869] It apparently covers the case of corporations doing business under a trade name.

B. ORGANIZATION OF CORPORATIONS.[870]

§ 6. Organization under special charter.

"A corporation which is created by special charter shall, if no time is limited therein, be organized within two years after the passage of its act of incorporation. The persons named in said act and their associate subscribers to stock before the date of the

[867] Lothrop Pub. Co. v. Lothrop, etc., Co., 191 Mass. 353. Cf. Hoxie v. Chaney, 143 Mass. 592; Sohier v. Johnson, 111 Mass. 238; Warren v. Warren Thread Co., 134 Mass. 247; Emerson v. Badger, 101 Mass. 82; Gilman v. Hunnewell, 122 Mass. 139 (cases of individual and firm names used as trademarks).

[868] St. 1907, c. 539, § 1.

[869] St. 1907, c. 539, § 2.

[870] As to subscriptions for stock, see infra, § 15.

act shall hold the franchise or privileges granted until the corporation is organized." [371]

a. Generally.

Corporations may be created at the pleasure of the legislature either by special act or under the general law.

The last sentence of this section originated in 1855.[372] Until the division of the capital stock into shares the associated members hold the whole stock in common.[373]

All acts of incorporation, whether general or special, are deemed public acts, of which all persons are required to take notice.[374]

b. Nature of charter.

A charter is not only a contract with the State,[375] but also a contract of each of the stockholders with the corporation; therefore minority stockholders are not bound by any action of the corporation or its directors outside the authorized scope of the corporate business.[376]

[371] St. 1903, c. 437, § 6; R. L., c. 109, §§ 12, 13; St. 1898, c. 336; Pub. St., c. 105, §§ 8, 9; Gen. St., c. 68, §§ 2, 3; St. 1856, c. 264, § 1; St. 1855, c. 140; Rev. St., c. 44, § 3; St. 1833, c. 83, § 2; St. 1829, c. 53, § 2; St. 1808, c. 65, § 2.

Citations. — Pub. St., c. 105, §9: Braintree Water Supply Co. v. Braintree, 146 Mass. 482, 16 N. E. Rep. 420.

Gen. St., c. 68, § 3: Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394.

St. 1855, c. 140: Newcomb v. Reed, 12 Allen, 363; Walworth v. Brackett, 98 Mass. 98.

Rev. St., c. 44, § 3: Narragansett Bank v. Atlantic Silk Co., 3 Met. 287; Worcester Medical Institute v. Harding, 11 Cush. 286; Rand v. Wilder, 11 Cush. 298; Lechmere Bank v. Boynton, 11 Cush. 387.

St. 1808, c. 65, § 2: Chester Glass Co. v. Dewey, 16 Mass. 97. See also, generally, Katama Land Co. v. Holley, 129 Mass. 540.

[372] St. 1855, c. 140, in effect April 6, 1855.

[373] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385.

[374] R. L., c. 175, § 72. Davis v. Old Colony R. R. Co., 131 Mass. 258; Whittenton Mills v. Upton, 10 Gray, 582, 598; Richardson v. Sibley, 11 Allen, 65, 72. See also supra, § 4, *d*.

[375] Supra, § 2, *a*.

[376] Byrne v. Schuyler Electric Manuf. Co., 65 Conn. 336. See as to ultra vires acts, supra, § 4, *zl* to *zo*. As to suits by minority stockholders, see infra, § 24, *b*.

c. When special acts take effect.

It is provided that "a statute shall take effect throughout the commonwealth, unless otherwise expressly provided therein, on the thirtieth day next after the day on which it is approved by the governor, or is otherwise passed and approved, or has the force of a law, conformably to the constitution." [377]

An act to take effect "from and after its passage" takes effect at the moment of its approval by the governor.[378]

d. Acceptance necessary.[379]

Ordinarily, in the case of a corporation created by special charter, the chartering act must be accepted by the corporation;[380] but the acceptance may be implied from corporate acts and need not be express,[381] and may be presumed from long acquiescence by all parties in the exercise of the corporate powers.[382] When accepted it becomes a contract with the State.[383]

"All that is necessary to constitute a corporation aggregate is the grant of a franchise by the government, assented to by the grantees. In the case of the creation of a private corporation by special charter, indeed, an acceptance is ordinarily required in order to give it effect. But an act of the Legislature, incorporating certain persons who have applied for a

[377] R. L., c. 8, § 1.

[378] Kennedy v. Palmer, 6 Gray, 316. See, also, Bemis v. Leonard, 118 Mass. 502, 505.

[379] Cf. R. L., c. 8, § 3.

[380] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 393; Riddle v. Merrimack Proprietors, 7 Mass. 169; Hamilton Ins. Co. v. Hobart, 2 Gray, 543; Charles River Bridge v. Warren Bridge, 7 Pick. 344; Ellis v. Marshall, 2 Mass. 269; Ladies', etc., Institute v. French, 16 Gray, 196; Lincoln, etc., Bank v. Richardson, 1 Me. 79; Thomas v. Dakin, 22 Wend. 9.

[381] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 393; Charles River Bridge v. Warren Bridge, 7 Pick. 344; Blandford Trustees v. Gibbs, 2 Cush. 39; Russell v. McLellan, 14 Pick. 63; Middlesex v. Davis, 3 Met. 133; Lexington R. R. v. Chandler, 13 Met. 311; State v. Carr, 5 N. H. 367; Williams v. Bank of Michigan, 7 Wend. 540; Ameriscoggin Bridge v. Bragg, 11 N. H. 102; Penobscot Boom Co. v. Lamson, 16 Me. 224; Bangor, etc., R. Co. v. Smith, 47 Me. 34.

[382] Cobb v. Kingman, 15 Mass. 197 (case of public corporation).

[383] Dartmouth College v. Woodward, 4 Wheat. 518. Also supra, § 2, *a*.

charter, and their associates, may constitute the persons named a corporation at once, without further action on their part, either in the admission of associates, the choice of officers, or the division of the capital stock." [384]

Where the Legislature extends the powers of a corporation, and there is nothing in the grant which expressly or by inference demands action by the stockholders, and the privilege granted contemplates an act within the scope of the authority of the directors, the action of the directors alone will be sufficient evidence of acceptance.[385]

e. Amendments to charter.

An act amendatory to the original charter does not require any acceptance, unless so prescribed by its terms.[386]

f. Effect of imperfect organization.[387]

Although, under this section, the persons named in the act are entitled to hold the franchise and privileges until the corporation is organized, it does not follow that they can collect subscriptions for stock from subscribers afterwards unless the corporation is properly organized.[388]

An organization under a special charter was held valid as against the State, although the first meeting was not called in the manner provided by the act, and although two out of the three incorporators had nothing to do with the organization and there were no subscribers to the capital stock before the act of incorporation, where the other corporators made no

[384] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 393, per Gray, J. See Frost v. Frostburg Coal Co., 24 How. (U. S.) 278; Day v. Stetson, 8 Greenl. 365; Penobscot Boom Co. v. Lamson, 16 Me. 224; N. Y. Fire Department v. Kip, 10 Wend. 266; Narragansett Bank v. Atlantic Silk Co., 3 Met. 282; Walworth v. Brackett, 98 Mass. 98.

[385] Eastern R. Co. v. Boston & Maine R. R., 111 Mass. 125 (acquiring additional land); Charles River Bridge v. Warren Bridge, 7 Pick. 344; Middlesex Husbandmen v. Davis, 3 Met. 133; Bangor, etc., R. Co. v. Smith, 47 Me. 34.

[386] Bangor, etc., R. R. v. Smith, 47 Me. 34.

[387] Cf. infra, § 7, *g*, *h*, *i*, § 9, *d*.

[388] Katama Land Co. v. Holley, 129 Mass. 540.

objection to the proceedings and did not claim corporate powers themselves until the organization of the corporation. It was further held that, as there were no subscribers to the stock before the date of incorporation, the persons named in the act were entitled to hold the franchise.[389]

Where the charter is to one and his associates and successors, he has all the powers of the corporation although no associates are immediately joined with him.[390]

Where a charter has not been complied with, but the State has not interfered, an individual who has for many years benefited by the existence of the corporation is estopped to deny its right to assert its privileges.[391]

g. Proof of charter — Presumption.

Where no charter is shown, the fact that a corporation has for many years exercised corporate powers raises a presumption of a grant, and renders extrinsic and oral evidence admissible to show a lost charter;[392] and if privileges are granted which can only be enjoyed in a corporate capacity, a grant of a charter is implied to the extent of enabling the said privileges to be enjoyed.[393]

Where a corporation accepts a later charter inconsistent with a former one it will, in general, be held to have waived the former act.[394]

[389] Walworth v. Brackett, 98 Mass. 98. Cf. Chester Glass Co. v. Dewey, 16 Mass. 94. See, also, McClinch v. Sturgis, 72 Me. 288; Ladies' Collegiate Institute v. French, 16 Gray, 196; Barrett v. Mead, 10 Allen, 337; Commonwealth v. Bakeman, 105 Mass. 53; Packard v. Old Colony R. Co., 168 Mass. 92.

[390] Penobscot Boom v. Lamson, 16 Me. 224.

[391] Quincy Canal v. Newcomb, 7 Met. 276 (user of canal estopped in an action for tolls to assert that canal not built to proper depth). Cf. infra, under *i*.

[392] Stockbridge v. West Stockbridge, 12 Mass. 400 (public corporation); Dillingham v. Snow, 5 Mass. 547. Cf. Jeffries Neck Pasture Proprietors v. Ipswich, 153 Mass. 42; infra, § 38.

[393] Stebbins v. Jennings, 10 Pick. 172. Cf. Shelton v. Banks, 10 Gray, 401; Walsh v. New York, etc., Bridge, 96 N. Y. 427.

[394] Comins v. Turner's Falls Co., 142 Mass. 443. Cf. Bangor, etc., R. Co. v. Smith, 47 Me. 34.

h. — Evidence.

The acceptance of a charter must be proved by the best evidence of the party who relies upon it.[395] The books of the corporation are, ordinarily, the best evidence; and, in the absence of these, resort must be had to implication from the acts of the corporation.[396]

i. Estoppel to deny corporate existence.

In general, one who contracts with another as a corporation is estopped to deny its existence as such.[397]

The corporation cannot deny its own certificate of organization,[398] and the members are similarly estopped as against the corporation.[399]

§ 7. Organization under general laws.

"Three or more persons may associate themselves by a written agreement of association with the intention of forming a corporation under general laws for any lawful purpose which is not excluded by the provisions of section one except to buy and sell real estate or to distil or manufacture intoxicating liquors." [400]

[395] Coffin v. Collins, 17 Me. 440.

[396] Farnsworth v. Lime Rock R. R., 83 Me. 440; Hudson v. Carman, 41 Me. 84; Coffin v. Collins, 17 Me. 440; Penobscot Boom v. Lamson, 16 Me. 224.

[397] Worcester Medical Inst. v. Harding, 11 Cush. 285; Provident Inst. Savings v. Bernham, 128 Mass. 458; Williamsburg Ins. Co. v. Frothingham, 122 Mass. 391. Cf. Narragansett Bank v. Atlantic Silk Co., 3 Met. 282; Farmers, etc., Bank v. Jenks, 7 Met. 592; Williams v. Cheney, 3 Gray, 215; Washington County Bank v. Lee, 112 Mass. 521; Merchants Nat. Bank v. Glendon Co., 120 Mass. 97; Topping v. Bickford, 4 Allen, 120; Conard v. Atlantic Ins. Co., 1 Pet. 386, 450.

[398] Dooley v. Cheshire Glass Co., 15 Gray, 494.

[399] Hampshire v. Franklin, 16 Mass. 76, 87.

[400] St. 1903, c. 437, § 7; R. L., c. 110, § 4; Pub. St., 106, § 6; St. 1870, c. 224, § 1; Gen. St., c. 61, § 1; St. 1852, c. 9; St. 1851, c. 133, § 1. Cf. R. L., c. 110, §§ 5–13.

Citations. — St. 1903, c. 437, § 7: Tulane University v. O'Connor, 192 Mass. 433.

Pub. St., c. 106, § 6: Larcom v. Olin, 160 Mass. 102, 35 N. E. Rep. 113.

St. 1870, c. 224, § 1: First Nat. Bank of Salem v. Almy, 117 Mass. 478; Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 564; Boston Rubber, etc., Co. v. Boston Rubber Co., 149 Mass. 439, 21 N. E. Rep. 875.

a. Generally.

In general, corporations organized under general laws have the same powers and privileges, and are subject to the same duties, restrictions and liabilities, which attach to corporations having special charters;[401] and incorporation under such general laws results in a contract between the corporations and the State, as in the case of a special charter.[402]

Statutes authorizing the formation of corporations for particular purposes do not restrict the rights of the public in regard to the subject-matter of the corporation's business, nor confer any peculiar rights on corporations or individuals.[403]

The beginning of corporation existence is expressly provided for in the present act.[404]

b. Who may associate.

The word "persons" in this section does not include corporations,[405] nor infants.[406] Nor can a husband and a wife lawfully join in an agreement of association, for such an agreement is a contract of each subscriber with every other, and a husband and wife cannot contract with each other.[407]

As to dummy stockholders, see infra, § 15, *a*.

Gen. St., c. 61, § 1: Peele v. Phillips, 8 Allen, 88; Merrick v. Reynolds Engine & Governor Co., 101 Mass. 383; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394; Hittinger v. Eames, 121 Mass. 539; Hudson v. J. B. Parker Machine Co., 173 Mass. 242, 53 N. E. Rep. 867.

St. 1852, c. 9: Atty.-Gen. v. Mercantile Ins. Co., 121 Mass. 525.

St. 1851, c. 133, § 1: Utley v. Union Tool Co., 11 Gray, 139; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394; Larcom v. Olin, 160 Mass. 102, 35 N. E. Rep. 113.

See also, generally: Boston Acid Mfg. Co. v. Moring, 15 Gray, 211; Dooley v. Cheshire Glass Co., 15 Gray, 494; Perkins v. Union, etc., Machine Co., 12 Allen, 273; Newcomb v. Reed, 12 Allen, 362; Walworth v. Brackett, 98 Mass. 98; Merrick v. Reynolds, etc., Co., 101 Mass. 381; 1 Op. Atty.-Gen. 47, 185.

401 Peele v. Phillips, 8 Allen, 86, 88. Cf. St. 1851, c. 133, § 5.

402 Abbott v. Johnstown, etc., R. Co., 80 N. Y. 27. See supra, § 2, *a*.

403 Hittinger v. Eames, 121 Mass. 509.

404 See infra, § 12.

405 See Coddington v. Haven, 8 N. J. Eq. 590.

406 Re Globe, etc., Association, 135 N. Y. 280, 284.

407 1 Op. Atty.-Gen. 47. The attorney-general has, however, since ruled contra. Op. Atty.-Gen., August 8, 1907.

c. Written agreement of association.

"There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings rest, and is designed to take the place of a charter or act of incorporation, by which corporate rights and privileges are usually granted. If there were no such requirement, there would be an absence of any provisions by which the right to exercise corporate power could be definitely fixed and established, and there would be no means of ascertaining the rights of stockholders or of persons dealing with such associations." [408]

Until organization, the written agreement has no other effect than to bind the subscribers mutually to each other as individuals,[409] but when the corporation has been once created the incorporated associates who hold the corporate franchise are members of the corporation.

The agreement of association imposes no additional liability upon the signers distinct from the general statutory liability for assessments duly voted by the corporation, and the liability to have shares sold for nonpayment of the same.[410]

d. Purposes — In general.

As we have seen, persons dealing with the corporation are bound to take notice of the purposes for which a corporation is formed.[411] Where a corporation is acting for a purpose entirely outside its charter or stated purpose, this should be dis-

[408] Utley v. Union Tool Co., 11 Gray, 139, 141, per Bigelow, J. Cf. Oregon Railway Co. v. Oregonian Railway Co., 130 U. S. 1; Ashbury v. Riche, L. R., 7 H. L. 653, 671.

[409] Perkins v. Union Button-Hole, etc., Machine Co., 12 Allen, 273, 278.

[410] Mechanics' Foundry, etc., Co. v. Hall, 121 Mass. 275.

[411] R. L., c. 175, § 72. Davis v. Old Colony R. R. Co., 131 Mass. 258, citing Whittenton Mills v. Upton, 10 Gray, 582, 598; Richardson v. Sibley, 11 Allen, 65, 72; Pearce v. Madison, etc., R. Co., 21 How. 441, 443; East Anglian Rys. v. Eastern Counties Ry., 11 C. B. 775, 811; Ashbury, etc., Co. v. Riche, L. R. 7 H. L. 653. See also supra, § 4, *d*.

tinguished from the abuse of a general power or the failure to comply with the prescribed formalities.[412]

Under the General Statutes, the purpose for which the corporation was formed must have been "distinctly and definitely specified in the articles of association."[413] Under this provision a specification that a company was established for "manufacturing and selling daguerreotype mattings and preservers, and all other goods, wares, merchandise, and articles made of brass, silver, gold, iron or other metals, or any compounds thereof," was held to be sufficiently distinct and definite.[414]

There is no legal objection to the manufacture by a single corporation of the greatest variety of articles.[415]

This clause is the most important part of the agreement, and should be most carefully drawn. Care should be taken to make the powers broad, and to this result it is well not to state them too much in detail.

Although section 7 of the act says that corporations may be formed for any lawful purpose except dealing in real estate and manufacturing liquors, it has been suggested, in connection with the similar New Jersey statute, that where special provisions have been or may be made for any particular class of corporations, this may indicate an intention to exclude them from the operation of this act, although they are not expressly mentioned either in section 7 or section 1(*c*).[416] Query, however, whether there are any such.

The New Jersey act says "purpose or purposes;" the Maine act follows the wording of the Massachusetts act. It seems, however, that this difference of language is immaterial, and that a corporation may be formed for several purposes.[417]

[412] Davis v. Old Colony Railroad, 131 Mass. 258; Zabriskie v. Cleveland, etc., Railroad, 23 How. 381, 398; Monument Bank v. Globe Works, 101 Mass. 57, 58; Ashbury, etc., Co. v. Riche, L. R. 7 H. L. 668, 684. See also supra, § 4, *zl* and *zn*. Cf. Nantasket Beach Steamboat Co. v. Shea, 182 Mass. 147.

[413] Gen. St., c. 61, § 2; St. 1851, c. 133, § 3.

[414] Bird v. Daggett, 97 Mass. 494.

[415] Bird v. Daggett, 97 Mass. 494.

[416] Dill on Corporations, 4th ed., 21.

[417] Cf. *Maine*, R. S. 1904, c. 47, § 6; *N. J.*, Laws of 1896, c. 185, § 6.

e. — Lawful purposes.

The following have been held to be proper purposes under this section: (1) Selling intoxicating liquors;[418] (2) dealing in bonds, stocks, grain and other things of a speculative nature;[419] (3) refining oil, coal and other minerals, and preparing them for use;[420] (4) manufacturing and selling coke, tar, ammonia, gas and other products of coal, so long as the corporation does not engage in distributing, and the intent not to so engage appears in the agreement of association.[421]

f. — Unlawful purposes.

The following have been held to be improper purposes: (1) registering employees and providing employment if they are discharged. Such a business is insurance.[422]

Upon an information in equity in the name of the attorney-general, at the relation of the commissioner of corporations, the supreme judicial court has power to restrain by injunction any corporation from assuming or exercising any franchise or privilege or transacting any kind of business not authorized by the charter of such corporation and the laws of the Commonwealth.[423]

g. Defective Organization.[424]

Many of the provisions as to procedure in forming a corporation are directory merely, and a literal compliance with them is not a necessary condition precedent to the existence of the corporation.[425] This was true, for example, of Gen. St.,

[418] Enterprise Brewing Co. v. Grime, 173 Mass. 252; 2 Op. Atty.-Gen. 55, overruling 1 Op. Atty.-Gen. 304.

[419] 1 Op. Atty.-Gen. 275.

[420] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 396.

[421] 2 Op. Atty.-Gen. 346.

[422] 1 Op. Atty.-Gen. 153.

[423] St. 1906, c. 372, in effect May 8, 1906. See supra, § 4, *so.*

[424] See also supra, § 6, *f*, and infra, § 9, *d.*

[425] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 393; Newcomb v. Reed, 12 Allen, 362; Merrick v. Reynolds, etc., Co., 101 Mass. 381; Braintree Water Supply Co. v. Braintree, 146 Mass. 488, 16 N. E. Rep. 420; Walworth v. Brackett, 98 Mass. 98; Narragansett Bank v. Atlantic Silk Co., 3 Met. 287; Middlesex v. Davis, 3 Met. 133. But see Utley v. Union Tool Co., 11 Gray, 141.

c. 61, § 1,[426] providing that certain persons who shall have associated themselves together and "shall have complied with the provisions of this chapter, shall be a corporation, etc." "The manifest intent of the first section, taken in connection with the rest of the chapter, is, that a corporation shall exist at least as soon as the first meeting has been held and the officers have been elected, if not immediately upon the signing of the fundamental articles of association, by which the intention of the associates to avail themselves of the privileges conferred by the Legislature is manifested, the name of the corporation determined, etc." [427] The present act provides expressly when the corporate existence shall commence.[428]

The failure to comply with merely directory provisions will not prevent the various duties and liabilities of their offices attaching to persons elected officers.[429]

Cases of defective organization should be discriminated from cases where there has been no organization at all. Thus, one who makes a purchase in the name of a corporation, organized by him, but not in good faith, and not a valid corporation, although believed by him to be such, is liable personally.[430]

There is a general presumption, in the absence of evidence to the contrary, that every corporation is duly organized.[431]

h. — Informalities no defence.[432]

The corporation cannot itself set up informalities as a defence to actions against it by creditors to whom it has held

[426] Originally St. 1851, c. 133.

[427] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 395, per Gray, J.; Utley v. Union Tool Co., 11 Gray, 139; Perkins v. Union Button-Hole, etc., Co., 12 Allen, 273; Newcomb v. Reed, 12 Allen, 363.

[428] Infra, § 12.

[429] Newcomb v. Reed, 12 Allen, 363.

[430] Montgomery v. Forbes, 148 Mass. 249. Cf. Fay v. Noble, 7 Cush. 188, 194.

[431] Narragansett Bank v. Atlantic Silk Co., 3 Met. 282, 287; Packard v. Old Colony R. Co., 168 Mass. 92, 98; Wallace v. Townsend Parish, 109 Mass. 263; Platt v. Grover, 136 Mass. 115; Commonwealth v. Carr, 143 Mass. 84; Welch v. Importers, etc., Bank, 122 N. Y. 177, 25 N. E. Rep. 269; Lorillard v. Cyde, 86 N. Y. 384; Copp v. Lamb, 12 Me. 312.

[432] Cf. supra, § 6, i.

itself out as a corporation,[433] nor can corporators, who have stood by and seen the corporation organized without objecting to informalities, thereafter object or try to escape their due liabilities.[434] Thus, if one has been fraudulently induced to subscribe for stock in a corporation which was never properly organized, he cannot rescind the contract and sue the other subscribers for the return of his subscription; his only remedy is in tort for the fraud or in equity for the return of his subscription.[435]

Where incorporation is only collaterally in issue, the fact that a company has transacted business as a corporation *de facto,* and that its certificates contain a recital that it was organized under the general laws, will authorize a jury to find that it was duly incorporated.[436]

i. — Effect of informality on appointment of agents.

Where the organization is defective in any material respects, there is no corporation, and therefore no agent can be appointed with authority to act for it.[437]

j. Evidence of the formation of a corporation.[438]

To form a corporation under the statute, its terms must be complied with, and this must be proved when the existence of the corporation is called in question.[439]

"Doubtless there may be cases where the existence of a corporation and the character and description of its functions and privileges may be shown by prescription or long user. In such case a charter or legislative grant of corporative power may be presumed." [440]

[433] Merrick v. Reynolds, etc., Co., 101 Mass. 381; Dooley v. Cheshire Glass Co., 15 Gray, 494.

[434] Walworth v. Brackett, 98 Mass. 98; Chester Glass Co. v. Dewey, 16 Mass. 94.

[435] Perry v. Hale, 143 Mass. 540, 542.

[436] Barrett v. Mead, 10 Allen, 337 (foreign corporation).

[437] Fay v. Noble, 7 Cush. 188, 194; Ward v. Brigham, 127 Mass. 24, 27.

[438] See supra, § 4, *c*, *d*, and *e*, § 6, *g*, *h*. As to the beginning of corporate existence, see infra, § 12, *d*.

[439] McKenney v. Bowie, 94 Me. 397, 400.

[440] Utley v. Union Tool Co., 11 Gray, 139, 140, per Bigelow, J.; U. S.

The certificate of the Secretary of the Commonwealth is the formal evidence of the existence of the corporation.[441] Proof of corporate acts, and copies of certificates filed with the Commissioner of Corporations, are competent evidence against a corporation to prove its organization, where it fails to produce its book of records.[442]

There is a general presumption that a corporation has been duly organized. "The maxim of law is that all things shall be presumed to have been rightly and correctly done until the contrary is proved. As the corporation could not proceed lawfully until duly organized, and as they did proceed to act as a corporation, this presumption has its effect." [443]

k. Meaning of "Joint stock company." [444]

This expression is used in many earlier acts. At common law a "joint stock company" was merely a large partnership.[445] Later it was a quasi-partnership, and, in England and some States, it was invested with some of the privileges of a

Bank v. Dandridge, 12 Wheat. 64; Trott v. Warren, 11 Me. 227; Sampson v. Bowdoinham Steam Mill Corp., 36 Me. 79; McKenney v. Bowie, 94 Me. 397; Wood v. Wiley Construction Co., 56 Conn. 87, 13 Atl. Rep. 137.

[441] First Nat. Bank of Salem v. Almy, 117 Mass. 478.

[442] Dooley v. Cheshire Glass Co., 15 Gray, 495; Narragansett Bank v. Atlantic Silk Co., 3 Met. 287; First Nat. Bank of Salem v. Almy, 117 Mass. 478; Priest v. Essex Hat Mfg. Co., 115 Mass. 380. See also Braintree Water Supply Co. v. Braintree, 146 Mass. 482, 16 N. E. Rep. 420; Middlesex Husbandmen v. Davis, 3 Met. 133; Worcester Medical Institution v. Harding, 11 Cush. 285; Appleton Ins. Co. v. Jesser, 5 Allen, 446; Topping v. Bickford, 4 Allen, 120; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385; Williamsburg, etc., Ins. Co. v. Frothingham, 122 Mass. 391.

[443] Narragansett Bank v. Atlantic Silk Co., 3 Met. 287, per Shaw, C. J. See supra, under *g*.

[444] As to unincorporated voluntary associations in Massachusetts, see Tyrrell v. Washburn, 6 Allen, 466; Phillips v. Blatchford, 137 Mass. 510; Alvord v. Smith, 5 Pick. 232; Newell v. Borden, 128 Mass. 31; Clark v. Reed, 11 Pick. 446; Ricker v. American L. & T. Co., 140 Mass. 346; Volger v. Ray, 131 Mass. 439; Ray v. Powers, 134 Mass. 22; Mayo v. Moritz, 151 Mass. 481; Weener v. Brayton, 152 Mass. 101; Willcox v. Arnold, 162 Mass. 577; Howe v. Morse, 174 Mass. 491; Kane v. Shields, 167 Mass. 392; Goulding v. Standish, 182 Mass. 401; Mesisco v. Giuliano, 190 Mass. 352.

[445] Bouvier Law Dict.

corporation.[446] An English joint stock company has been held to be a corporation in this country,[447] but it is essentially a partnership, whereas in the United States a corporation is an entity, and individual liability is a statutory exception.[448]

In the statutes of Massachusetts the term "joint stock company" refers to companies organized under the general law, as distinguished from those receiving special charters. The earliest statute authorizing the formation of corporations without a special charter so designates this class of corporations,[449] and in later statutes prior to the General Statutes the same phrase is uniformly used.[450] In the General Statutes, corporations having no special charter are called corporations "organized under general laws." Both expressions are used in later acts.[451]

§ 8. Agreement of association.

"The agreement of association shall state: —

"(a) That the subscribers thereto associate themselves with the intention of forming a corporation.

"(b) The corporate name assumed.

"(c) The location of the principal office of the corporation in the commonwealth, and elsewhere in the case of corporations organized to do business wholly outside the commonwealth.

"(d) The purposes for which the corporation is formed and the nature of the business to be transacted.

"(e) The total amount of the capital stock of the corporation, which shall not be less than one thousand dollars, to be authorized; the par value of the shares, which shall not be less than five dollars; the number of shares into which the capital stock is to be divided, and the restrictions, if any, imposed upon their transfer; and, if there are to be two or more classes of stock, a description of the different classes and a statement of the terms on which they are to be created and of the method of voting thereon.

[446] Ibid.

[447] Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

[448] Lowell, Transfer of Stock, §§ 3, 184.

[449] St. 1851, c. 133.

[450] St. 1852, cc. 9, 76; St. 1854, c. 438; St. 1855, cc. 68, 478.

[451] Atty.-Gen. v. Mercantile Ins. Co., 121 Mass. 524.

"(f) Any other provisions not inconsistent with law for the conduct and regulation of the business of the corporation, for its voluntary dissolution, or for limiting, defining or regulating he powers of the corporation, or of its directors or stockholders, or any class of stockholders.

"(g) The subscriber or subscribers by whom the first meeting of the incorporators shall be called.

"(h) The names and residences of the incorporators and the amount of the stock subscribed for by each."[452]

§ 9. First meeting of incorporators.

"The first meeting of the incorporators of a corporation created by special law shall, unless such law otherwise provides, be called by a notice signed by a majority of the persons named in the act of incorporation; and the first meeting of the incorporators of a corporation organized under general laws shall be called by a notice signed either by such subscriber to the agreement of association as may be designated therein or by a majority of the subscribers to such agreement; and such notice shall state the time, place and purposes of the meeting. A copy of such notice shall, seven days at least before the day appointed for the meeting, be given to each incorporator or left at his residence or usual place of business, or deposited in the post office, postage prepaid, and addressed to him at his residence or usual place of business, and another copy thereof, and an affidavit of one of the signers that the notice has been duly served, shall be recorded with the records of the corporation. If all of the incorporators shall in writing, indorsed upon the agreement of association, or, in the

[452] St. 1903, c. 437, § 8; R. L., c. 110, § 15; St. 1902, c. 441; Pub. St., c. 106, § 16; St. 1870, c. 224, § 7; St. 1866, c. 290, § 2; Gen. St., c. 61, § 2; St. 1851, c. 133, § 3.

Citations. — St. 1870 c. 224, § 7: First Nat. Bank of Salem v. Almy, 117 Mass. 478; Mechanics' Foundry & Mach. Co. v. Hall, 121 Mass. 275; Davis v. Old Colony R. R., 131 Mass. 260; Boston Rubber, etc., Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875.

Gen. St., c. 61, § 2: Bird v. Daggett, 97 Mass. 494.

St. 1851, c. 133, § 3: Utley v. Union Tool Co., 11 Gray, 141; Bird v. Daggett, 97 Mass. 494; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394.

As to "(b) the corporate name assumed," see supra, § 5. As to "(d), the purposes for which the corporation is founded," see supra, § 7, *d–f*. As to "(f) other provisions," see under By-laws, infra, § 13.

case of a corporation created by a special law, upon the charter or a certified copy thereof, waive such notice and fix the time and place of the meeting, no notice shall be required." [453]

a. Who may sign the notice.

This section is substantially the same as in the Revised Laws, except that formerly any one or more of the subscribers might sign the notice, instead of one designated, or a majority.

The last sentence of the section is declaratory of the law before its enactment; [454] and where one of three corporators called a meeting, and the other two did not object and never claimed to organize corporate powers, the organization was held valid, although the two did not attend the meeting or participate in the organization.[455] So one contracting with the corporation may be estopped to set up noncompliance with this section.[456]

[453] St. 1903, c. 437, § 9; R. L., c. 110, § 17; c. 109, §§ 13, 14; Pub. St., c. 106, § 18; St. 1870, c. 224, § 9; St. 1866, c. 290, § 4; Gen. St., c. 61, § 3; St. 1855, c. 478, § 2; Pub. St., c. 105, §§ 9, 10; Gen. St., c. 68, §§ 3, 4; St. 1855, c. 140; Rev. St., c. 44, § 3; St. 1833, c. 83, § 2; St. 1829, c. 53, § 2; St. 1808, c. 65, § 2.

Citations. — St. 1870 c. 224, § 9: First Nat. Bank of Salem v. Almy, 117 Mass. 478.

Gen. St., c. 61, § 3: Perkins v. Union Buttonhole, etc., Machine Co., 12 Allen, 278; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 395.

St. 1855, c. 478, § 2: Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 395.

Pub. St., c. 105, § 9: Braintree Water Supply Co. v. Braintree, 146 Mass. 488, 16 N. E. Rep. 420.

Gen. St., c. 68, § 3: Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394.

Gen. St., c. 68, § 4; St. 1855, c. 140: Newcomb v. Reed, 12 Allen, 363; Walworth v. Brackett, 98 Mass. 98.

Rev. St., c. 44, § 3: Narragansett Bank v. Atlantic Silk Co., 3 Met. 287; Worcester Medical Institute v. Harding, 11 Cush. 286; Rand v. Wilder, 11 Cush. 298; Lechmere Bank v. Boynton, 11 Cush. 387.

St. 1808, c. 65, § 2: Chester Glass Co. v. Dewey, 16 Mass. 97. See also, generally, Katama Land Co. v. Holley, 129 Mass. 540.

[454] Braintree Water Supply Co. v. Braintree, 146 Mass. 488, 16 N. E. Rep. 420; Walworth v. Brackett, 98 Mass. 98. Cf. Babbitt v. East Jersey Iron Co., 1 Stew. Dig., p. 208.

[455] Walworth v. Brackett, 98 Mass. 98.

[456] Worcester Medical Institution v. Harding 11 Cush. 286; Butchers & Drovers' Bank v. McDonald, 130 Mass. 264.

Where it is necessary for a majority of the corporators to sign a notice, and a partnership name is signed, it may be considered as the signature of the two partners, but it is safer for each to sign individually.[457]

b. Service of notice.

Where it was attempted to serve a notice personally, one of the corporators had gone away and given no notice of his going or where he might be found. He had left his office in charge of his son, who was to transact his business so far as he could do so, and the son receipted for the notice. It was held that prima facie this was equivalent to notice.[458]

c. Place of organization and order of business.

The meeting for organization should be held within the State,[459] and inasmuch as the corporation is not yet formed,[460] other business than that of organization is not in order.[461]

d. Provisions, how far directory.[462]

The provisions of this section are directory merely, and intended to secure to all the members of the corporation their right to participate in its proceedings,[463] and to avoid the confusion which might result if two parties attempted separately to organize under the same charter.[464]

[457] Chester Glass Co. v. Dewey, 16 Mass. 97.

[458] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 395. Note that at this time, under Gen. St., c. 61, § 3, personal service or publication was required.

[459] 1 Op. Atty.-Gen. 185; 2 Op. Atty.-Gen. 496; Miller v. Ewer, 27 Me. 509; Freeman v. Machias, etc., Co., 38 Me. 343; Ormsby v. Vermont Copper Co., 56 N. Y. 623; Smith v. Silver Valley Mining Co., 64 Md. 85; Camp v. Byrne, 41 Mo. 525. Cf. St. 1903, c. 437, § 20.

[460] St. 1903, c. 437, § 12.

[461] Mayberry v. Mead, 80 Me. 27.

[462] Cf. supra, § 6, *f*, § 7, *g*, *h*.

[463] Braintree Water Supply Co. v. Braintree, 146 Mass. 488, 16 N. E. Rep. 420; Newcomb v. Reed, 12 Allen, 363; Walworth v. Brackett, 98 Mass. 98; Narragansett Bank v. Atlantic Silk Co., 3 Met. 287. Cf. McClinch v. Sturgis, 72 Me. 288; Simpson v. Garland, 76 Me. 203.

[464] Newcomb v. Reed, 12 Allen, 363. This confusion actually occurred in Lechmere Bank v. Boynton, 11 Cush. 369.

Inasmuch as this section is directory merely, the various duties and liabilities may attach to the persons elected officers, although there were informalities in the organization.[465]

Where the preliminary steps for organization have been taken de facto, and no defects appear in the subsequent proceedings for many years, it will be presumed that the first organization was made.[466]

e. Evidence of meeting.

Where it does not appear from the records or from any written evidence that this section has been complied with, extrinsic and oral evidence is competent.[467]

§ 10. Organization of first meeting.[468]

"At such first meeting, or at any adjournment thereof, the incorporators shall organize by the choice, by ballot, of a temporary clerk, who shall be sworn, by the adoption of by-laws and by the election in such manner as the by-laws may determine of directors, of a treasurer, of a clerk and of such other officers as the by-laws may prescribe. The temporary clerk shall make and attest a record of the proceedings until the clerk has been chosen and sworn, including a record of such choice and qualification." [469]

This section applies also to corporations organized under special charters.[470] Its language is the same as in the Revised

[465] Newcomb v. Reed, 12 Allen, 363.

[466] Barrett v. Mead, 10 Allen, 337. Cf. Commonwealth v. Bakeman, 105 Mass. 53.

[467] Worcester Medical Institution v. Harding, 11 Cush. 286.

[468] Cf. supra, chap. III, D.

[469] St. 1903, c. 437, § 10; R. L., c. 110, § 19; Pub. St., c. 106, § 20; St. 1870, c. 224, § 10; Gen. St., c. 61, § 5; St. 1851, c. 133, §§ 4, 5.

Citations. — St. 1870, c. 224, § 10: First Nat. Bank of Salem v. Almy, 117 Mass. 478.

Gen. St., c. 61, § 5: Peele v. Phillips, 8 Allen, 88; Com. v. Hamilton Mfg. Co., 12 Allen, 309; McRae v. Locke, 114 Mass. 96; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 432, 28 N. E. Rep. 300.

St. 1851, c. 133, § 4: Utley v. Union Tool Co., 11 Gray, 141; Boston Acid Mfg. Co. v. Moring, 15 Gray, 211; Dooley v. Cheshire Glass Co., 15 Gray, 494; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394.

St. 1851, c. 133, § 5: Utley v. Union Tool Co., 11 Gray, 141; Peele v. Phillips, 8 Allen, 88; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394.

[470] Peele v. Phillips, 8 Allen, 88.

Laws, except that the statute formerly required the directors, clerk and treasurer to be chosen by ballot. As a practical matter, the by-laws would usually provide for an election by ballot. The clerk should not be empowered to cast one ballot for each officer, for this nullifies the purpose of having a ballot and tends to prevent free choice. The Commissioner of Corporations does not approve of such a method of organizing.

Under section 12 of the act, the record of the first meeting must be submitted to the Commissioner of Corporations, who may require such amendment thereof or such additional information as he may consider necessary.

The provisions of section 18 of the act, as to the election of officers, obviously do not apply to the original meeting of the subscribers for organization.[471]

§ 11. Articles of organization.[472]

"A majority of the directors who are elected at such first meeting shall forthwith make, sign and make oath to articles setting forth: —

"(a) A true copy of the agreement of association and the names of the subscribers thereto, or of the act of incorporation, as the case may be.

"(b) The date of the first meeting and of the successive adjournments thereof, if any.

"(c) The amount of capital stock then to be issued; the amount thereof to be paid for in full in cash; the amount thereof to be paid for in cash by instalments and the instalment to be paid before the corporation commences business; and the amount thereof to be paid for in property. If such property consists in any part of real estate, its location, area and the amount of stock to be issued therefor shall be stated; if any part of such property is personal, it shall be described in such detail as the commissioner of corporations may require, and the amount of stock to be issued therefor stated. If any part of the capital stock is issued for services or expenses, the nature of such services or expenses and the amount of stock which is issued therefor shall be clearly stated.

[471] Boston Acid Manuf. Co. v. Moring, 15 Gray, 211.

[472] See supra, chap. III, D, F.

"(d) The name, residence and post office address of each of the officers of the corporation.

"The directors who sign such articles shall be jointly and severally liable to any stockholder of the corporation for actual damages caused by any statement therein which is false and which they know to be false." [473]

a. Provisions, how far mandatory.

Under the General Statutes and the Public Statutes, it was necessary to make this certificate before the corporation commenced business, but it was decided that such a provision did not prevent the corporation from recovering upon a contract made before its duty with respect to this certificate was performed;[474] and conversely the corporation could not set up

[473] St. 1903, c. 437, § 11; R. L., c. 110, §§ 20, 44; Pub. St., c. 106, § 21; St. 1870, c. 224, § 11; Gen. St., c. 61, § 8; St. 1857, c. 276, § 1; St. 1855, c. 68, § 2; St. 1851, c. 133, § 4; Pub. St., c. 106, §§ 47, 48; St. 1875, c. 177, § 2; St. 1870, c. 224, § 27; Gen. St., c. 60, § 14; Rev. St., c. 38, § 24; St. 1829, c. 53, § 8.

Citations. — Pub. St., c. 106, § 21: Com. v. Carroll, 145 Mass. 406, 14 N. E. Rep. 618; Boston Rubber, etc., Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875; American Order of Scottish Clans v. Merrill, 151 Mass. 561, 24 N. E. Rep. 918; 1 Op. Atty.-Gen. 206; 1 Op. Atty.-Gen. 662–664.

St. 1870, c. 224, § 11: First Nat. Bank of Salem v. Almy, 117 Mass. 478; Rice v. Nat. Bank of the Commonwealth, 126 Mass. 300; Davis v. Old Colony R. R., 131 Mass. 260; Boston Rubber, etc., Co. v. Boston Rubber Co., 149 Mass. 439, 21 N. E. Rep. 875; American Order of Scottish Clans v. Merrill, 151 Mass. 361, 24 N. E. Rep. 918.

Gen. St., c. 61, § 8: Cochrane v. Reed, 13 Allen, 455; Bradley v. Poole, 98 Mass. 181; Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 395; Moore v. Reynolds, 109 Mass. 473; Pope v. Leonard, 115 Mass. 286; Priest v. Essex Hat Mfg. Co., 115 Mass. 380; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 431, 28 N. E. Rep. 300.

St. 1857, c. 276, § 1: Cochrane v. Reed, 13 Allen, 457.

St. 1851, c. 133, § 4: Utley v. Union Tool Co., 11 Gray, 141; Boston Acid Mfg. Co. v. Moring, 15 Gray, 211; Dooley v. Cheshire Glass Co., 15 Gray, 494; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394.

St. 1870, c. 224, § 27: Mechanics' Foundry & Mach. Co. v. Hall, 121 Mass. 275.

[474] Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 431, 28 N. E. Rep. 300. Cf. Augur Steel Axle & Gear Co. v. Whittier, 117 Mass. 451, as to a similar Connecticut statute.

its failure in this respect in an action against it by a creditor.[475]

b. False statements in articles.

After placing the sworn articles upon the public records, in compliance with the statute, the directors and officers of a corporation are estopped from setting up their falsity to aid in defeating an action against it.[476]

As to the liability of officers for false statements under this section, see infra, §§ 34 e, 36.

A claim against the officers of a corporation for making a false statement under this section cannot be joined with other entirely different causes of action in one bill in equity.[477]

c. Issue of stock.

As to the issue of stock for property, see infra, § 14.

§ 12. Certificate of incorporation.[478]

"The articles of organization and the record of the first meeting of the incorporators shall be submitted to the commissioner of corporations, who shall examine them and who may require such amendment thereof or such additional information as he may consider necessary. If he finds that the articles conform to the provisions of the preceding sections relative to the organization of the corporation, he shall so certify and indorse his approval thereon. Thereupon, the articles shall, upon payment of the fee hereinafter provided, be filed in the office of the secretary of the commonwealth, who shall cause them and the indorsement thereon to be recorded, and, except in the case of a corporation created by special law, shall thereupon issue a certificate of incorporation in the following form: —

[475] Dooley v. Cheshire Glass Co., 15 Gray, 494; Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381.

[476] Dooley v. Cheshire Glass Co., 15 Gray, 494.

[477] As to actions against officers for failure to make a proper statement under the provisions of earlier acts, see also Cochrane v. Reed, 13 Allen, 455; Merchants' Bank v. Stevenson, 10 Gray, 232; Kinsley v. Rice, 10 Gray, 325; Priest v. Essex Hat Mfg. Co., 115 Mass. 380.

[478] See supra, Chap. III, F.

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"Be it known that whereas (the names of the subscribers to the agreement of association) have associated themselves with the intention of forming a corporation under the name of (the name of the corporation), for the purpose (the purpose declared in the agreement of association), with a capital stock of (the amount fixed in the agreement of association, with a statement of the several classes into which the stock is divided and their respective amounts, and of the method of paying for such stock, whether by cash in full, cash on instalments, property, or partly cash and partly property), and have complied with the provisions of the statutes of this commonwealth in such case made and provided, as appears from the articles of organization of said corporation, duly approved by the commissioner of corporations and recorded in this office: now, therefore, I (the name of the secretary), secretary of the commonwealth of Massachusetts, do hereby certify that said (the names of the subscribers to the agreement of association), their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of (name of the corporation), with the powers, rights and privileges, and subject to the limitations, duties and restrictions, which by law appertain thereto.

"Witness my official signature hereunto subscribed, and the great seal of the commonwealth of Massachusetts hereunto affixed, this day of in the year (the date of filing of the articles of organization).

"The secretary shall sign the certificate of incorporation and cause the great seal of the commonwealth to be thereto affixed, and such certificate shall have the force and effect of a special charter. The existence of every corporation which is not created by special law shall begin upon the filing of the articles of organization in the office of the secretary of the commonwealth. The secretary of the commonwealth shall also cause a record of the certificate of incorporation to be made, and such certificate, or such record, or a certified copy thereof, shall be conclusive evidence of the existence of such corporation." [479]

[479] St. 1903, c. 437, § 12; R. L., c. 110, § 20; Pub. St., c. 106, § 21; St. 1870, c. 224, § 11; Gen. St., c. 61, § 8; St. 1857, c. 276, § 1; St. 1855, c. 68, § 2; St. 1851, c. 133, § 4.

Citations. — Pub. St., c. 106, § 21: Com. v. Carroll, 145 Mass. 406;

a. Nature and effect of certificate.

The certificate from the Secretary is the equivalent of a special charter,[480] and is conclusive evidence of the existence of the corporation, and therefore of the corporation's right to the corporate name inserted in the certificate.[481] So, after the issuing of the certificate, the members of the corporation cannot be held liable as partners.[482] So, also, when once the certificate of the Secretary has been issued, even though it has been obtained by fraud, the corporation cannot be attacked by individuals by an information in the nature of quo warranto.[483] The franchise can be annulled only by the Legislature or by proceedings brought by the Commonwealth.[484]

Boston Rubber, etc., Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875; American Order of Scottish Clans v. Merrill, 151 Mass. 561, 24 N. E. Rep. 918; 1 Op. Atty.-Gen. 206.

St. 1870, c. 224, § 11: First National Bank of Salem v. Almy, 117 Mass. 478; Rice v. Nat. Bank of the Commonwealth, 126 Mass. 300; Davis v. Old Colony R. R., 131 Mass. 260; Boston Rubber, etc., Co. v. Boston Rubber Co., 149 Mass. 439, 21 N. E. Rep. 875; American Order of Scottish Clans v. Merrill, 151 Mass. 561, 24 N. E. Rep. 918.

Gen. St., c. 61, § 8: Cochrane v. Reed, 13 Allen, 455; Bradley v. Poole, 98 Mass. 181; Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 395; Moore v. Reynolds, 109 Mass. 473; Pope v. Leonard, 115 Mass. 286; Priest v. Essex Hat Mfg. Co., 115 Mass. 380; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 431, 28 N. E. Rep. 300.

St. 1857, c. 276, § 1: Cochrane v. Reed, 13 Allen, 457.

St. 1855, c. 68, § 2: Atty.-Gen. v. Mercantile Ins. Co., 121 Mass. 525.

St. 1851, c. 133, § 4: Utley v. Union Tool Co., 11 Gray, 141; Boston Acid Mfg. Co. v. Moring, 15 Gray, 211; Dooley v. Cheshire Glass Co., 15 Gray, 494; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394.

[480] Oregon R. Co. v. Oregonian R. Co., 130 U. S. 1.

[481] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875; Dollbear v. American Bell Telephone Co., 126 U. S. 1. Cf. American Order of Scottish Clans v. Merrill, 151 Mass. 561, 24 N. E. Rep. 918; Chamberlin v. Huguenot Mfg. Co., 118 Mass. 532.

[482] First Nat. Bank of Salem v. Almy, 117 Mass. 478. The cause of action sought to be maintained in this case was for having transacted busines before the whole of the capital stock was paid in, in violation of St. 1870, c. 224, § 32.

[483] Rice v. National Bank, 126 Mass. 300; Haupt v. Rogers, 170 Mass. 71. Cf. Goddard v. Smithett, 3 Gray, 116.

[484] Rice v. National Bank, 126 Mass. 300. Cf. Elizabethtown Gas Light Co. v. Green, 49 N. J. Eq. 329; Stockton v. American Tobacco Co., 55 N. J. Eq. 352.

b. Old corporations reorganizing under present law.

We have seen that corporations already incorporated under certain special acts may reorganize under this law;[485] other corporations of the kinds covered by the act are subject to its provisions by force of the act.[486] In the Revised Laws it was provided that corporations organized under St. 1851, c. 133; Gen. St., c. 61, or St. 1866, cc. 187 and 200, might file a similar certificate of organization with the Commissioner of Corporations and receive from the Secretary of the Commonwealth a certificate similar to the one mentioned in this section,[487] and be thereafter subject to existing laws; it seems that this provision is no longer in force in view of the provisions of the new act.[488] Under this provision in the Revised Laws, the existence of a corporation which had not availed itself of the right to obtain such a certificate could be proved without its production.[489]

c. Beginning of corporate existence.

It is expressly provided in this section that any corporation not created by special law shall begin to exist upon the filing of the articles of organization in the office of the Secretary of the Commonwealth. This provision is new, while the rest of the last paragraph of this section originated in St. 1870, c. 224, § 11.[490]

The provision in question appears to have been intended to settle the doubt previously existing in regard to corporations formed under general laws, as to what matters of organization should be deemed precedent to the existence of the corporation, and which were merely directory. We have seen already that

[485] Supra, § 2.

[486] Supra, § 1.

[487] Supra, §§ 1, 2, and infra, § 40.

[488] R. L., c. 110, § 21; Pub. St., c. 106, § 22.

[489] Commonwealth v. Carroll, 145 Mass. 406, 14 N. E. Rep. 618.

[490] It was decided under Gen. St., c. 61, that a corporation existed so as to be able to contract as soon as its first meeting had been held and its officers elected, if not immediately upon the signing of the agreement of association. Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394. Cf. Utley v. Union Tool Co., 11 Gray, 139, 141; McGinty v. Athol Reservoir Co., 155 Mass. 183, 184.

under prior statutes a corporation has been held to have been organized, although some features of the organization prior to and necessary for obtaining the certificate from the Secretary had not been carried out.[491]

§ 13. By-laws.[492]

"Every corporation may determine by its by-laws the time and place of holding and the manner of conducting its meetings, and, in accordance with the provisions of section eighteen, of electing its officers, the powers, duties and tenure of its officers, the number of its directors, the number of stockholders and of directors necessary to constitute a quorum, the manner of calling regular and special meetings of the directors, the expediency of providing for an executive committee, the number of members thereof, and the duties which may be delegated to it, the method of making demand for payment of subscriptions to its capital stock, the conditions under which a new certificate of stock may be issued in place of a certificate which is alleged to have been lost or destroyed, the method in general of transacting its business and the manner by which the by-laws may be altered, amended or repealed." [493]

a. This section permissive.

The provisions of this section are permissive, and do not exclude by-laws upon other subjects than those mentioned.[494] Indeed, the last few lines of the section imply as much.

b. Effect of by-laws.

"The office of a by-law is to regulate the conduct and define the duties of the members towards the corporation and between themselves. So far as its provisions are in the nature of contract, the parties thereto are the members of the association as between themselves; or the corporation upon the one side, and

[491] Supra, § 6, *f*, § 7, *g*. Cf. as to corporations organized under special charter, supra, § 6, *o*.

[492] As to an executive committee, see infra, § 19. As to by-laws giving a lien on shares, see infra, § 28, *f* (12).

[493] St. 1903, c. 437, § 13; R. L., c. 110, § 26; Pub. St., c. 106, § 28; St. 1870, c. 224, § 20; Gen. St., c. 60, § 7; Rev. St., c. 38, § 7; St. 1829, c. 53, § 15. Not cited to 193 Mass.

[494] Davis v. Lowell Meeting-House, 8 Met. 321, 325.

its individual members upon the other. The right of any third person, stranger to the association, to establish a legal claim through such a by-law must depend upon the general principles applicable to express contracts." [495]

The corporation alone has the power to make by-laws.[496] If valid, by-laws are binding upon all members of the corporation,[497] but not upon third persons without notice.[498] In this respect they differ from acts of incorporation which are public acts of which all persons must take notice.[499] The result is that third persons are not bound by special limitations upon the authority of officers, for example, expressed in the by-laws, but may assume that officers have the powers usually appertaining to their respective offices.[500] The result may be different if they have actual knowledge of the by-laws. But even where they have agreed in writing to be bound by the by-laws, and the by-laws empower the directors to amend them, third persons are not bound by new by-laws of which they have no notice.[501] Many by-laws are directory merely.[502]

If a by-law is partly void as beyond the power of the corporation, the valid part will be sustained, if separable from the rest; [503] but a by-law which is void cannot be made effective by printing it on the face of the certificates.[504]

[495] Flint v. Pierce, 99 Mass. 68, 70, per Wells, J. Cf. as to municipal corporations, Commonwealth v. Turner, 1 Cush. 493. See also Mellen v. Whipple, 1 Gray, 317, 323ff; Flint v. Pierce, 99 Mass. 68, 71.

[496] Hale v. Mechanics' Mutual Fire Ins. Co., 6 Gray, 173.

[497] Richardson v. Devine, 193 Mass. 336, 79 N. E. Rep. 771; Came v. Brigham, 39 Me. 35; Cummings v. Webster, 43 Me. 192, 197.

[498] Kingsley v. New England Ins. Co., 8 Cush. 393, 402; State v. Overton, 24 N. J. L. 435. Cf. Fay v. Noble, 12 Cush. 1.

[499] Supra, § 4, *d*.

[500] Fay v. Noble, 12 Cush. 1; Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577, 582. Cf. Corcoran v. Snow Cattle Co., 151 Mass. 74, 75; Narragansett Bank v. Atlantic Silk Co., 3 Met. 282, 289; Emery v. Boston Marine Ins. Co., 138 Mass. 398, 412.

[501] Kimins v. Boston Five Cents Savings Bank, 141 Mass. 33.

[502] Hastings v. Blue Hill Turnpike Co., 9 Pick. 80, 83. This was a by-law requiring the clerk to be sworn, which was not required by the statute. Section 18 of the present act requires the clerk to be sworn. Cf. as to by-laws of savings banks as to deposit books, Kingsley v. Whitman Savings Bank, 182 Mass. 252, and cases cited.

[503] Amesbury v. Bowditch Ins. Co., 6 Gray, 582.

[504] Conklin v. Second National Bank, 45 N. Y. 655.

c. Must be reasonable.

By-laws must be reasonable and in conformity to common law, the Constitution and statutes of the State, and to public policy.[505] Whether a by-law is reasonable is a question of law for the court.[506] By-laws cannot enlarge the powers granted by the statute or charter,[507] and, of course, cannot be adopted by or for a corporation until the latter is completely organized, so that they cannot govern the first meeting of the incorporators.[508]

In accordance with the principle that by-laws must be reasonable and in conformity with public policy, the following have been held void:

(1) Providing that a suit against the corporation must be brought in a particular jurisdiction.[509]

(2) Uuduly restraining trade.[510]

(3) Unduly restraining the transfer of shares or the conveyance of property.[511]

(4) Imposing an additional liability to creditors.[512]

(5) Providing for the expulsion of members of the corporation.[513]

[505] Sargent v. Franklin Ins. Co., 8 Pick. 90; Com. v. Worcester, 3 Pick. 462; Nute v. Hamilton Mutual Ins. Co., 6 Gray, 174; Traders', etc., Ins. Co. v. Brown, 142 Mass. 403; Kennebec, etc., R. Co. v. Kendall, 31 Me. 470; Jay Bridge v. Woodman, 31 Me. 593; Matthews v. Associated Press, 136 N. Y. 333; State v. Overton, 24 N. J. L. 435.

[506] Lowell on Transfer of Stock, § 48; Com. v. Worcester, 3 Pick. 462; State v. Overton, 24 N. J. L. 435.

[507] Traders, etc., Ins. Co. v. Brown, 142 Mass. 403; Andrews v. Mutual Ins. Co., 37 Me. 256; Stewart v. Odd Fellows', etc., Ins. Co., 12 N. J. L. J. 110; State v. Utter, 34 N. J. L. 489.

[508] Boston Acid Mfg. Co. v. Moring, 15 Gray, 214.

[509] Nute v. Hamilton Ins. Co., 6 Gray, 174; Amesbury v. Bowditch, etc., Ins. Co., 6 Gray, 596. As to a similar provision in a charter, see Boynton v. Middlesex Ins. Co., 4 Met. 212.

[510] Matthews v. Associated Press, 136 N. Y. 333.

[511] Sargent v. Franklin Ins. Co., 8 Pick. 90; Morgan v. Struthers, 131 U. S. 246, 253; Chouteau Spring Co. v. Harris, 20 Mo. 382; Moore v. Bank of Commerce, 52 Mo. 377.

[512] Trustees of Free Schools v. Flint, 13 Met. 543; Flint v. Pierce, 99 Mass. 68; Gamwell v. Pomeroy, 121 Mass. 207.

[513] People v. Cotton Exchange, 8 Hun, 216. See Gregg v. Mass. Medical Society, 111 Mass. 185, 192, where authority was given by the charter.

(6) Providing that members of a corporation shall submit all controversies to arbitration.[514]

(7) Providing that the members of the corporation shall be liable individually and collectively for money borrowed, where there is nothing in the statutes or charter authorizing such a by-law.[515]

(8) Disturbing the vested rights of stockholders.[516]

On the other hand, the following by-laws have been held valid:

(1) Limiting the time within which an action against the corporation must be brought.[517]

(2) Prescribing the time and place of stockholders meetings, and regulating the mode of calling them.[518]

(3) Regulating the voting at meetings.[519]

(4) Prescribing the duties of officers.[520]

(5) Prescribing certain qualifications for membership in the corporation.[521]

(6) Providing that voluntary contributions shall be refunded.[522]

Cf. Cook v. Kent, 105 Mass. 246. In New Jersey, however, a by-law authorizing the removal of officers of the corporation has been held valid. Re Griffing Iron Co., 63 N. J. L. 168.

[514] State v. Merchants' Exchange, 2 Mo. App. 96; Miles v. Schmidt, 168 Mass. 339; White v. Middlesex R. Co., 135 Mass. 216. A by-law that damages shall be ascertained by arbitration may, however, be valid. Miles v. Schmidt, 168 Mass. 339.

[515] Trustees of Free Schools v. Flint, 13 Met. 539. Cf. Flint v. Pierce, 99 Mass. 68, 71; Gamwell v. Pomeroy, 121 Mass. 207. In the latter case all the stock holders agreed in writing to be responsible as partners to creditors.

[516] Kent v. Quicksilver Mining Co., 78 N. Y. 159 (issue of preferred stock).

[517] Amesbury v. Bowditch, etc., Ins. Co., 6 Gray, 596.

[518] Re Long Island R. Co., 19 Wend. 37; Taylor v. Griswold, 14 N. J. L. 222. If there is no by-law, the general agent of a manufacturing corporation may call a meeting. Stebbins v. Merritt, 10 Cush. 31. See also Stephens v. Taft, 3 Gray, 488.

[519] State v. Tudor, 5 Day (Conn.) 329.

[520] Hale v. Mechanics', etc., Ins. Co., 6 Gray, 169; Burden v. Burden, 159 N. Y. 287.

[521] Taylor v. Edson, 4 Cush. 522.

[522] Davis v. Lowell Meeting House, 8 Met. 321.

(7) Giving cumulative remedies.[523]

(8) Imposing fines for non-attendance or refusal to accept office.[524]

(9) Authorizing assessments upon members for general expenses.[525]

(10) Requiring bonds of officers.[526]

(11) Determining the quorum of directors.[527]

d. By-laws regulating stock transfer.

Even where a power is expressly given by the charter to regulate stock transfers, this does not include authority to prohibit transfers altogether, for that would be in restraint of trade;[528] nor to provide that transfers shall be approved by the president.[529] And an express power given in the by-laws to directors to refuse to assent to transfers must be exercised honestly, in a reasonable manner and for some valid reason.[530] It may be noted, however, that, if a stockholder or purchaser of shares expressly agree to abide by the provisions of such a by-law, the agreement may be valid, although the by-law as such may be invalid.[531]

The charters of some corporations give authority to make by-laws regarding stock transfers;[532] and by-laws intended to keep the control of the corporation in certain hands or to continue a certain line of policy, by giving the corporation an option to take the shares at a certain price if the holder dies

[523] Connecticut R. Co. v. Bailey, 24 Vt. 465.

[524] Tobacco Pipe Makers v. Woodruffe, 7 Barn. & C. 838.

[525] Mussey v. Bulfinch Street Society, 1 Cush. 148.

[526] Savings Bank v. Hunt, 72 Mo. 597. See infra, § 18, *g* to *n*.

[527] Hoyt v. Thompson, 19 N. Y. 207. This is also especially mentioned in the present act.

[528] Morgan v. Struthers, 131 U. S. 246, 253; Sargent v. Franklin Ins. Co., 8 Pick. 90; Chouteau Spring Co. v. Harris, 20 Mo. 382; Moore v. Bank of Commerce, 52 Mo. 377.

[529] Sargent v. Franklin Ins. Co., 8 Pick. 90.

[530] Johnson v. Laflin, 5 Dill. 65; Ex parte Penny, L. R. 8 Ch. 446. In Farmers Bank v. Wasson, 48 Iowa, 336, such a by-law was held void. See Hubbard v. Manhattan Trust Co., 30 C. C. A. 520, 87 Fed. Rep. 51 (2d Circ.); Walburn v. Ingilby, 1 Milne & K. 61.

[531] New England Trust Co. v. Abbott, 162 Mass. 148.

[532] E. g. Boston Safe Deposit & Trust Co., St. 1875, c. 123.

or wishes to part with them, have been held valid, at least if agreed to.[533]

But it has been held that such a by-law does not prevent a contract to transfer to some one else than the corporation.[534] A contract between all the stockholders in a corporation and the corporation itself, not to sell their stock during the term of the contract without the written assent of a majority of the stockholders, has also been held not void as against public policy.[535]

By-laws requiring registration of stock transfers have been nearly universal, and the matter is now covered also by statute.[536]

A by-law giving the corporation a lien on his shares for debts due from a stockholder is probably valid.[537]

e. Waiver of by-laws.

By-laws may be expressly or impliedly waived by the corporation,[538] but not by its officers, unless authorized to do so.[539]

f. Change in date of annual meeting.

Whenever any change is made altering the date fixed in the by-laws for the annual meeting of a corporation, it must file

[533] New England Trust Co. v. Abbott, 162 Mass. 148; Price v. Minot, 107 Mass. 49; Whiton v. Batchelder & Lincoln Co. 179 Mass. 169; Barrett v. King, 181 Mass. 476; Lindsay v. Arlington, etc., Ass'n, 186 Mass. 371, 374; Ireland v. Globe Milling Co., 21 R. I. 9; Margate v. Shortridge, 5 H. L. C. 297; Moffett v. Farquhar, 6 Ch. D. 591. See Bond v. Mount Hope Iron Co., 99 Mass. 505; Tuttle v. Batchelder & Lincoln Co., 170 Mass. 315; Jones v. Brown, 171 Mass. 318. Cf., as to Pews, French v. Old South Society, 106 Mass. 488; Davis v. Lowell Meeting House, 8 Met. 325. Cf., as to by-laws of banks to the effect that shares shall be deemed hypothecated to the banks for debts, Nesmith v. Washington Bank, 6 Pick. 324; Plymouth Bank v. Bank of Norfolk, 10 Pick. 454; Massachusetts Iron Co. v. Hooper, 7 Cush. 183.

[534] Price v. Minot, 107 Mass. 49, 60.

[535] Central Roller Shade Co. v. Cushman, 143 Mass. 353.

[536] Infra, § 28. Cf. Central National Bank v. Williston, 138 Mass. 244, 247.

[537] See infra § 28, *f* (12).

[538] Clarke v. New England, etc., Ins. Co., 6 Cush. 342.

[539] Hale v. Mechanics', etc., Ins. Co., 6 Gray, 173.

in the office of the Commissioner of Corporations a certificate of such change, signed and sworn to by its clerk.[540]

§ 14. Issue of stock.

"Capital stock may be issued for cash, property, tangible or intangible, services or expenses. Stock which is issued for cash may be paid for in full before it is issued or by instalments. If it is paid for by instalments, the stock certificate shall be legibly stamped with the words "——— per cent paid up, balance payable [stating manner and time of payment] ——— and shares subject to forfeiture if unpaid", the proportion and terms of payment being stated to agree with the facts; and, as each instalment is demanded and paid, the certificate shall be stamped accordingly. Stock may be issued subsequent to the issue of stock certified by the articles of organization if a certificate is prepared within thirty days after the date when the issue of such additional stock has been authorized, and is signed and sworn to by the president, treasurer and a majority of the directors setting forth: — (a) the total amount of capital stock authorized; (b) the amount of stock already issued for cash payable by instalments and the amount paid thereon; also the amount of full paid stock already issued for cash, property, services or expenses; (c) the amount of additional stock to be issued for cash, property, services or expenses respectively; (d) a description of said property, and a statement of the nature of said services or expenses, in the manner required by the provisions of section eleven. Such certificate shall be submitted to the commissioner of corporations, who shall examine it in the same manner as the original articles of organization. If he finds that it conforms to the requirements of law, he shall so certify and indorse his approval thereon, and it shall thereupon be filed in the office of the secretary of the commonwealth who, upon payment of the fee hereinafter provided, shall cause it and the indorsement thereon to be recorded. No issue of stock subsequent to the issue of stock certified by the articles of organization shall be lawful until said certificate shall have been filed in the office of the secretary of the commonwealth as aforesaid. No stock shall be at any time issued unless the cash, so far as due, or the property, services or expenses for which it was authorized to be issued has been actually received or incurred by,

[540] St. 1905, c. 222, in effect March 27, 1905.

or conveyed or rendered to, the corporation; and the president, treasurer and directors shall be jointly and severally liable to any stockholder of the corporation for actual damages caused to him by such issue." [641]

a. Comparison with previous law.

This section marks one of the principal departures from the previous policy of the commonwealth in regard to corporations, and especially in two respects: 1. Stock may now be issued

[641] St. 1903, c. 437, § 14. See Pub. St., c. 106, § 46; St. 1875, c. 177, § 2; St. 1870, c. 224, § 32; St. 1866, c. 290, § 8; Gen. St., c. 61, § 8; Gen. St., c. 60, §§ 17, 18; St. 1857, c. 276, § 1; St. 1851, c. 133, § 4; Rev. St., c. 38, §§ 16, 17; St. 1829, c. 53, § 6; Pub. St., c. 106, §§ 47, 48; St. 1875, c. 177, § 2; St. 1870, c. 224, § 27; Gen. St., c. 60, § 14; Rev. St., c. 38, § 24; St. 1829, c. 53, § 8; Pub. St., c. 106, § 49; St. 1879, c. 275 §§ 2, 3.

Citations. — Pub. St., c. 106, § 46: Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 429, 28 N. E. Rep. 300; 1 Op. Att'y-Gen'l. 662–664.

St. 1870, c. 224, § 32: First Nat. Bank of Salem v. Almy, 117 Mass. 476; Nickerson v. Wheeler, 118 Mass. 299; Mechanics' Foundry & Machine Co. v. Hall, 121 Mass. 275; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 431, 28 N. E. Rep. 300; 1 Op. Atty.-Gen. 206, 663.

St. 1866, c. 290, § 8: Ward v. Brigham, 127 Mass. 24.

Gen. St., c. 61, § 8: Cochrane v. Reed, 13 Allen, 455; Bradley v. Poole, 98 Mass. 181; Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 395; Moore v. Reynolds, 109 Mass. 473; Pope v. Leonard, 115 Mass. 286; Priest v. Essex Hat Mfg. Co., 115 Mass. 380; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 431, 28 N. E. Rep. 300.

Gen. St., c. 60, § 17: Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 429, 28 N. E. Rep. 300; 1 Op. Atty.-Gen. 659, 663.

Gen. St., c. 60, § 18: Newcomb v. Reed, 12 Allen, 365; Pope v. Salamanca Oil Co., 115 Mass. 290; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

St. 1857, c. 276, § 1: Cochrane v. Reed, 13 Allen, 457.

St. 1851, c. 133, § 4: Utley v. Union Tool Co., 11 Gray, 141; Boston Acid Mfg. Co. v. Moring, 15 Gray, 211; Dooley v. Cheshire Glass Co., 15 Gray, 494; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394.

Rev. St., c. 38, § 16: Stedman v. Eveleth, 6 Met. 123; Curtis v. Harlow, 12 Met. 4; Knowlton v. Ackley, 8 Cush. 96; Wyman v. American Powder Co., 8 Cush. 182; Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. 580; Holyoke Bank v. Burnham, 11 Cush. 186; Thayer v. Union Tool Co., 4 Gray, 75; Cabot Bank v. Bodman, 11 Gray, 137; Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 14 Gray, 194; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray, 219; Howe v. Boston Carpet Co., 16 Gray, 496; Cary v. Holmes, 2 Allen, 498; Barre Nat. Bank v.

for intangible property, good-will, etc. 2. Stock issued for cash need not be fully paid in before the corporation commences business.[542]

b. Issue for property, services or expenses.

At common law, in the absence of charter restrictions, a corporation could always issue stock for property, labor or services as well as money, at an honest and bona fide valuation.[543]

Hingham Mfg. Co., 127 Mass. 570; Potter v. Stevens Machine Co., 127 Mass. 594.

Rev. St., c. 38, § 17: Stedman v. Eveleth, 6 Met. 114; Curtis v. Harlow, 12 Met. 3; Sargent v. Webster, 13 Met. 506; Wyman v. American Powder Co., 8 Cush. 182; Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. 580; Holyoke Bank v. Burnham, 11 Cush. 186; Howe v. Boston Carpet Co., 16 Gray, 493; Bond v. Clark, 6 Allen, 362; Peele v. Phillips, 8 Allen, 86; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

St. 1829, c. 53, § 6: Mill Dam Foundery v. Hovey, 21 Pick. 419; Bordman v. Osborne, 23 Pick. 300; Holyoke Bank v. Burnham, 11 Cush. 189; Child v. Boston & Fairhaven Iron Works, 137 Mass. 519.

Pub. St., c. 106, § 47: Honsucle v. Ruffin, 172 Mass. 423, 52 N. E. Rep. 525; 1 Op. Atty.-Gen. 662–664.

St. 1870, c. 224, § 27: Mechanics' Foundry & Machine Co. v. Hall, 121 Mass. 275.

Pub. St., c. 106, § 49: Honsucle v. Ruffin, 172 Mass. 423, 52 N. E. Rep. 525.

[542] *Historical.* The prohibition in R. L., c. 110, § 43, against a corporation transacting business until the whole amount of its capital stock was paid in, originated in St. 1870, c. 224, § 32. Prior to that time there was no prohibition against a corporation carrying on business without payment of its capital stock. 1 Op. Atty.-Gen. 659, 663. Under R. L., c. 110, § 44, capital stock was required to be paid in in cash, unless a certificate of the president, treasurer, and a majority of the directors was filed giving a description of property transferred in place of cash, and its value. Where a subscriber borrowed money from a bank to pay for his stock, sold property to the corporation and used the corporation's check to pay his loan at the bank, it was held that the stock was not paid for in cash. Harvey-Watts Co. v. Worcester Umbrella Co., 193 Mass. 138. And the same was held where a subscriber borrowed to pay for stock and the next day repaid the loan with money borrowed from the corporation on his note. Harvey-Watts Co. v. Worcester Umbrella Co., 193 Mass. 138. Cf. International Paper Co. v. Gazette Co., 182 Mass. 578.

[543] Camden v. Stuart, 144 U. S. 104; Coit v. Gold, etc., Co., 119 U. S. 343; Wyman v. American Powder Co., 8 Cush. 168; Boston, etc., R. Co. v. Wellington, 113 Mass. 79; New Haven, etc., Nail Co. v. Linden Spring Co., 142 Mass. 349; Gillin v. Sawyer, 93 Me. 151; Close v. Noye, 147 N. Y. 597.

Therefore the present act is in this regard a return to the common law, and a doing away with an artificial restriction.

The directors are the sole judges of the value of the property capitalized under the new law.[544]

In one case, where no stock was issued, but money was expended for property, and the members agreed that their rights should pass with their property, it was held the corporation was properly organized.[545]

c. — What is property, etc.

Stock should be issued for property only to the amount of the true value of the property in money.[546] Good-will is property within the meaning of this section.[547] So, also, are patent rights, as they exist equally in every State.[548]

Promotion expenses.

An expenditure of money by promoters for travelling expenses, rent and tools, with the intent that it shall operate as payments for stock, is not a payment in cash under this section, although it may be the basis of a claim against the corporation for reimbursement.[549]

Bonus stock.

An agreement to give shares of stock to one procuring subscriptions is void, although the subscriptions are procured, as it gives an unfair advantage to such person over the other stockholders.[550]

[544] Formerly the commissioner of corporations was the judge. R. L., c. 110, § 44.

[545] McGinty v. Athol Reservoir Co., 155 Mass. 184, 29 N. E. Rep. 510.

[546] Wetherbee v. Baker, 35 N. J. Eq. 501; Edgerton v. Electric Improvement, etc., Co., 50 N. J. Eq. 354; Donald v. American Smelting, etc., Co., (N. J.) 48 Atl. Rep. 771; Libby v. Tobey, 82 Me. 397.

[547] Washburn v. National Wall Paper Co., 81 Fed. Rep. 17; Peabody v. Norfolk, 98 Mass. 452, 457. As to good will see also, generally, Hutchinson v. Nay, 183 Mass. 355; s. c., 187 Mass. 262; Moore v. Rawson, 185 Mass. 264.

[548] Wilson v. Martin-Wilson Fire Alarm Co., 149 Mass. 24.

[549] Honsucle v. Ruffin, 172 Mass. 420.

[550] Nickerson v. English, 142 Mass. 267.

d.—Sale of merchandise in bulk.

In view of the frequent practice for a corporation to buy the business of a firm, an individual or another corporation and to issue stock therefor, attention should be called to the fact that such a trasaction is, on its face, within the terms of the statute prohibiting the sale of merchandise in bulk.[551]

e. Issue of partly-paid stock.

Where the capital is not fully paid in at the start, the liability of the stockholders ordinarily takes the place of the unpaid part of the subscriptions.[552] This is on the theory that where stock purports to be fully paid up, purchasers and creditors have a right to rely on that being the fact.[553] The present act, however, provides that certificates shall bear upon their face the facts as to part payment, so that the reason of the rule would not apply under the new law.

Under the former law, requiring the capital to be paid in before the corporation did business, it was nevertheless decided that a contract made by a corporation before the capital was paid in was not void, but the liability of the stockholders took the place of the unpaid portion of the capital.[554] Conversely the corporation cannot set up the nonpayment of stock in full as a defence in an action against a creditor.[555]

f. Treasury stock.

The term "treasury stock" is sometimes wrongly used to denote stock which has not been issued. The present act does

[551] St. 1903, c. 415. For the text of the act and decisions under it, see supra, § 4, *v.*

[552] Merrick v. Reynolds Engine, etc., Co., 101 Mass. 381; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 28 N. E. Rep. 300; Appleton v. Turnbull, 84 Me. 72; McAvity v. Lincoln Co., 82 Me. 504; Pettibone v. Toledo, etc., R. Co., 148 Mass. 411, 414, per Field, J. Cf. Augur Steel Axle, etc., Co. v. Whittier, 117 Mass. 451; Cambridge Water Works v. Somerville, etc., Co., 4 Allen, 239.

[553] Pettibone v. Toledo, etc., R. Co., 148 Mass. 411, 414. Cf. Libby v. Tobey, 82 Me. 397; Morgan v. Howland, 89 Me. 484.

[554] Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 128 N. E. Rep. 300; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385.

[555] Dooley v. Cheshire Glass Co., 15 Gray, 494; Merrick v. Reynolds Engine, etc., Co., 101 Mass. 381.

not require all the capital stock of a corporation to be issued at the start, but as we have seen, § 14 requires a certificate to be approved by the Commissioner of Corporations before additional stock is issued.[556]

"Treasury stock," properly so-called, is stock which has been issued and is full paid, and which, through gift or purchase, has come back into the possession of the company. For example, it is quite common to issue the entire capital or part of it to promoters in exchange for property at its full value, and for the promoters thereupon to donate a certain portion of the stock so received to the treasury of the corporation. Such stock, having been fully paid can then be sold by the company for any price, even below par, like any other property; and can be thus used to provide working capital.[557]

g. Issue of fictitiously paid stock.[558]

This section requires that, where stock not fully paid is issued, the certificates shall be stamped with the per cent. paid. Certificates might be issued falsely stamped, or the payment might be fictitious, or the property overvalued.

In such cases persons who were defrauded could apply to a court of equity asking to have the sale rescinded as to them or for other appropriate relief.[559] And such issue would likewise be invalid as against creditors.[560]

[556] Cf. 3 Thompson, Corp., § 3196.

[557] Conyngton, Corp. Management, 43, 149, 150; Elliott v. Baker, 194 Mass. 518, March 1, 1907.

[558] As to the liability of the president, treasurer and directors for debts and contracts where stock is issued in violation of the provisions of this section, see infra, § 34.

[559] Sawyer v. Hoag, 17 Wall. 610; Camden v. Stuart, 144 U. S. 104; Wetherbee v. Baker, 35 N. J. Eq. 501; Melvin v. Lamar Ins. Co., 80 Ill. 446; Fisk v. Chicago, etc., R. Co., 53 Barb. 513. Cf. Field v. Pierce, 102 Mass. 253, 260; New Haven Horse Nail Co. v. Linden Spring Co., 142 Mass. 349, 354; Lake Superior Iron Co. v. Drexel, 90 N. Y. 87, 92.

[560] Libby v. Tobey, 82 Me. 397; Barron v. Burrill, 86 Me. 66; Wetherbee v. Baker, 35 N. J. Eq. 501; Lee v. Heppenheimer, 55 N. J. Eq. 240. See Douglass v. Ireland, 73 N. Y. 100, 106. See, generally, 2 Clark & Marshall, Corp., §§ 389–401j.

h. Overissued stock.[561]

Certificates issued in excess of the total authorized capital are absolutely void, and the holders thereof do not become stockholders,[562] or entitled to vote or to receive dividends thereon.[563]

But where stock is issued by an officer or agent authorized to issue it, the corporation is liable to bona fide purchasers or pledgees who are injured thereby.[564] And the same principle applies where a new certificate is issued upon a forged or unauthorized transfer.[565]

The officers who fraudulently issue certified certificates are also liable to bona fide holders.[566]

But the corporation is not liable, where the certificates are issued by officers who had no real or apparent authority to issue them, unless it has been negligent in some way.[567]

"The ground on which a corporation is held liable to a bona fide purchaser for the value of false certificates of its stock issued under its seal, signed by the proper officers, and apparently genuine, is that the certificates are statements by the corporation of facts which it is its duty to know, and which cannot well be known to the purchaser. It is the duty of the proper officers of the corporation to ascertain that its stock has been transferred in accordance with its by-laws, and in ac-

[561] As to forged certigcates, see infra, § 26, *e*. As to criminal provisions, see infra, under *i*.

[562] New York & New Haven R. Co. v. Schuyler, 34 N. Y. 30.

[563] Kent v. Quicksilver Mining Co., 78 N. Y. 159.

[564] Allen v. South Boston R. Co., 150 Mass. 200; Farrington v. South Boston R. Co., 150 Mass. 406; New York & New Haven R. Co. v. Schuyler, 34 N. Y. 30; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616.

[565] Machinists' Nat. Bank v. Field, 126 Mass. 345; Simm v. Anglo-American Telegraph Co., 5 Q. B. Div. 188. Cf. infra, § 31.

On the other hand, "if the purchaser exhibits to the corporation a forged assignment of stock, or a forged power of attorney to assign it, and thus obtains a new certificate which he sells, he is liable to the corporation, not because it is his duty to attend to the transfer of stock, but because he has impliedly represented the forged signature to be the genuine signature of a stockholder, whereby he has deceived the corporation. Boston & Albany R. Co. v. Richardson, 135 Mass. 473." Allen v. South Boston R. Co., 150 Mass. 200, 204, per Field, J.

[566] Bruff v. Mali, 36 N. Y. 200. See Windram v. French, 151 Mass. 547.

[567] Knox v. Eden Musee American Co., 148 N. Y. 441; Mechanics Bank v. New York, etc., R. Co., 13 N. Y. 599.

cordance with law, before they issue a new certificate." [568] "The defendant cannot be compelled to issue new certificates or to recognize the old ones as valid, because to do so would cause an overissue of its capital stock, but it is liable in damages. In assessing damages, the Superior Court has taken the value of the stock to be its market value at the time when the defendant first refused to recognize the stock as valid and to permit a transfer of it. This would be the rule of damages if the certificates were valid.[569] We think the same rule of damages applies to these certificates." [570]

Where stock has been illegally issued, a subscriber can elect to rescind his contract, and recover the amount paid by him from the corporation, deducting any dividends he may have received.[571]

i. Fraudulent issue of stock.

The principles laid down in the last division as to the liability of the corporation for fictitious issues of certificates apply to fraudulent issues of certificates, although these may not in fact cause an overissue of shares.

Where, however, a purchaser or pledgee deals with an officer of a corporation who is acting personally, he is put upon inquiry, and must use due care to discover the fraud.

Thus, if an officer of a corporation, having the power, alone or with others, to issue certificates, fraudulently issues certificates for his own private advantage to one from whom he has borrowed money, the holder is not a bona fide holder without notice, even though he does not actually know of the fraud, but is charged with notice that the officer is acting individually, and must act with due care in investigating the title of the

[568] Allen v. South Boston R. Co., 150 Mass. 200, 204, per Field, J.

[569] Sargent v. Franklin Ins. Co., 8 Pick. 90; Wyman v. American Powder Co., 8 Cush. 168.

[570] Allen v. South Boston R. Co., 150 Mass. 200, 207, per Field, J., citing Re Bahia v. San Francisco Railway, L. R. 3 Q. B. 584.

[571] American Tube Works v. Boston Machine Co., 139 Mass. 5; Reed v. Boston Machine Co., 141 Mass. 454; Allen v. Herrick, 15 Gray, 274, 284; Spring Co. v. Knowlton, 103 U. S. 49.

officer; and, in the absence of due care, cannot recover from the corporation.[572]

So, where treasury stock was issued by a vote of three directors out of five, passed at a meeting of which the other two had no notice, for the purpose of securing control by the votes of the person to whom the stock was issued, at a price which was a fair market price but less than what could have been obtained from the rival party, at a time when the corporation was not in need of money, it was held that the certificate should be cancelled and the stock returned to the treasury of the corporation.[573]

The following criminal provisions apply to unauthorized and fraudulent issues of stock.

"An officer, agent, clerk or servant of a corporation, or any other person, who issues or signs with intent to issue a certificate of stock in a corporation, or who issues, signs or endorses with intent to issue a bond, note, bill or other obligation or security in the name of such corporation, beyond the amount authorized by law or limited by the legal votes of such corporation or its proper officers, or negotiates, transfers or disposes of such certificate with intent to defraud, shall be punished by imprisonment in the state prison for not more than ten years or in the house of correction for not more than one year." [574]

"An officer, agent, clerk or servant of a corporation, or any other person, who fraudulently issues or transfers a certificate of the stock of a corporation to a person who is not entitled thereto, or who fraudulently signs such certificate, in blank or otherwise, with the intent that it shall be so issued or transferred by himself or any other person, shall be punished by imprisonment in the state prison for not more than ten years or in the house of correction for not more than one year." [575]

[572] Farrington v. South Boston R. Co., 150 Mass. 406; Moores v. Citizens National Bank, 111 U. S. 156; Hill v. Jewett Publishing Co., 154 Mass. 172. Cf. Lowell, Transfer of Stock, § 112; Windram v. French, 151 Mass. 547. But see Cincinnati, etc., R. Co. v. Citizens Nat. Bank, 56 Ohio St. 351.

[573] Elliott v. Baker, 194 Mass. 518, Mar. 1, 1901. Cf. Gray v. Portland Bank, 3 Mass. 364; Way v. American Grease Co., 60 N. J. Eq. 263.

[574] R. L., c. 208, § 56; Pub. St., c. 203, § 54; Gen. St., c. 161, § 49; St. 1858, c. 114; St. 1856, c. 123, § 1.

See also infra, § 28, *d*.

[575] R. L., c. 208, § 57; Pub. St., c. 203, § 55; Gen. St., c. 161, § 50; St. 1856, c. 123, § 2.

§ 15. Payment of subscription to stock.[576]

"If, by the provisions of the articles of organization, capital stock which is issued for cash is to be paid for in full before it is issued, the directors may require payment of the subscriptions therefor in such proportions and at such times and places as they deem proper by making demand therefor according to the by-laws, or, in default of such by-law, by a notice mailed to each subscriber at least seven days before such subscription is payable. If the subscriber refuses or neglects to pay the amount so demanded for thirty days after the time limited in such notice for payment, his rights of subscription may be sold by public auction by the treasurer of the corporation who, out of the proceeds of such sale, shall pay to the corporation the amount then due from such subscriber with interest and incidental charges, first giving notice by mail to such subscriber, not less than ten days prior to such sale, of the time and place appointed therefor and of the amount due and payable by him. Upon the sale of such rights as aforesaid, the directors shall give to the purchaser a certificate thereof. If the rights of such subscriber do not sell for an amount sufficient to pay the amount due from him with interest and charges of sale, he shall be liable to the corporation in an action at law for the deficiency; if they sell for more, he shall be entitled to the surplus. At the expiration of thirty days after the time limited for payment as aforesaid, the directors may waive their right to offer such rights for sale, and may elect to proceed by an action at law against such delinquent subscriber to recover all amounts due and payable by him with interest. If said rights are not sold at said auction, or if a judgment rendered in an action against a subscriber remains unsatisfied for thirty days, all amounts previously paid by him shall be forfeited to the corporation."[577]

[576] As to subscriptions to new stock, see infra, § 40. As to foreign corporations, see infra, § 61, *l*.

[577] St. 1903, c. 437, § 15. Cf. as to assessments upon shares, R. L., c. 110, §§ 40, 41; Pub. St., c. 106, §§ 43, 44.

This section is new, although parts of it are similar to the provisions of the previous law relating to calls or assessments. The clause giving the corporation a right to bring an action of contract against a subscriber, where the sale of his rights does not satisfy the debt due from him, was not in the former law as applying to the collection of calls. There the only remedy was the sale of the shares. Chester Glass Co. v. Dewey, 16 Mass. 94, 102; Mechanics', etc., Machine Co. v. Hall, 121 Mass. 272; Franklin Glass Co. v. White, 14 Mass. 286, 289.

a. Who may subscribe.

In this State, a married woman may contract as if she were sole, and may therefore subscribe for shares.[578]

An infant may subscribe for shares, but, as in case of other contracts except for necessaries, he may repudiate his contract upon attaining his majority, and may sue for the amount he has paid, even though he cannot put the other party *in statu quo*.[579] For this reason, and also because subscriptions by infants cannot be counted in determining whether the total has been subscribed,[580] it is undesirable that subscriptions should be received from infants.

One may subscribe through an agent as well as personally;[581] but one is not bound by the acts of an unauthorized agent in the absence of ratification or estoppel,[582] and, in such a case the agent does not become a subscriber any more than the principal.[583]

A partner may subscribe by express authority of the other partners, or within the scope of the partnership business;[584] but, if he subscribes without authority, he is liable personally.[585]

Bonus stock cannot be given by a secret agreement to one who procures subscriptions as it gives an unfair advantage over other subscribers.[586]

[578] R. L., c. 153, § 2.

[579] White v. New Bedford Cotton Waste Co., 178 Mass. 20. Cf. Matter of Globe Assoc., 135 N. Y. 280, 284; Phillips v. Covington, etc., Bridge Co., 2 Met. (Ky.) 219. If the corporation to which the infant subscribes is wound up and shares of a new corporation taken for its assets, the infant cannot recover from the new corporation, his contract being with the old one. White v. Mount Pleasant Mills Co., 172 Mass. 462.

[580] Phillips v. Covington, etc., Bridge Co., 2 Met. (Ky.) 219; Hahn's Appeal, 7 Atl. (Pa.) 482.

[581] Burr v. Wilcox, 22 N. Y. 551; Re New York, etc., R. Co., 99 N. Y. 12; Musgrave v. Morrison, 54 Md. 161.

[582] Salem Mill-Dam Co. v. Ropes, 9 Pick. 187, 196; Ticonic Water, etc., Co. v. Lang, 63 Me. 480.

[583] Salem Mill-Dam Co. v. Ropes, 9 Pick. 187, 196.

[584] Union Hotel Co. v. Hersee, 79 N. Y. 454.

[585] Ibid.

[586] Nickerson v. English, 142 Mass. 267.

Dummy stockholders.

Those who sign the articles of association must be taken to have assumed the responsibilities and to have the rights of stockholders, in the absence of further evidence, even though it appears that their shares were paid for by one of the incorporators and that they took shares at his request.[587]

b. Nature of subscription for stock.

An agreement to take stock in a corporation is an offer which becomes a binding contract only when accepted by the corporation after its organization.[588]

"The corresponding agreements of the other subscribers, the organization of a corporation, and the allotment to the defendant of the shares for which he subscribed, furnish sufficient consideration for his promise to take and pay for those shares. Although his promise was originally voluntary or in the nature of a mere open proposition, yet having been accepted and acted on by the party authorized to do so, before he attempted to retract it, he has lost the right to revoke. His proposition has become an accepted mutual contract, and is binding upon him as well as upon the corporation." [589]

"The admission of the subscribers as stockholders is the consideration for their promises to pay, and the corporation can recover the amount agreed to be paid, not merely as a debt due to the corporation, but as a part of the capital stock which the subscribers have agreed to furnish and put at the risk of the business. The unpaid subscriptions are a trust fund held for

[587] Bi-Spool Sewing Machine Co. v. Acme Co., 153 Mass. 404, 408. Cf. England v. Dearborn, 141 Mass. 590.

[588] Hudson Real Estate Co. v. Tower, 156 Mass. 82; Hudson Real Estate Co. v. Tower, 161 Mass. 10; People's Ferry Co. v. Balch, 8 Gray, 303, 310; New Bedford & Bridgewater Turnpike v. Adams, 8 Mass. 138; Essex Turnpike v. Collins, 8 Mass. 292; Kennebec & Portland R. Co. v. Palmer, 34 Me. 366; Penobscot R. Co. v. Dummer, 40 Me. 172; Richmond Factory v. Clarke, 61 Me. 351; Starrett v. Rockland Ins. Co., 65 Me. 374; Skowhegan, etc., R. Co. v. Kinsman, 77 Me. 370; Athol Music Hall v. Carey, 116 Mass. 471; Cottage St. Church v. Kendall, 121 Mass. 528; Gray v. Portland Bank, 3 Mass. 364; Sewall v. Eastern R. Co., 9 Cush. 5.

[589] Athol Music Hall Co. v. Carey, 116 Mass. 471, 474, per Wells, J. Cf. Phillips Limerick Academy v. Davis, 11 Mass. 113, 116, 117.

the benefit of the creditors of the corporation, and any creditor whose debt has been reduced to a judgment, and who has been unable to obtain satisfaction of it from the corporation, may, under the general jurisdiction of a court of chancery maintain a bill to apply these subscriptions to the payment of his judgment." [590]

c. — Offer to subscribe.

The mere declaration of a member of a corporation at one of its meetings that he will contribute half of his estate to the purposes of the corporation is not a promise to pay assessments to that amount, for the corporation cannot make a verbal contract except through some duly authorized officer or agent.[591]

d. — Acceptance of offer.

The fact that by reason of a gratuitous promise to a corporation, others are induced to subscribe, is no consideration for the gratuitous promise; the latter can be binding only if it is accepted or acted upon by the corporation.[592] "In every case in which this court has sustained an action upon a promise of this description, the promisee's acceptance of the defendant's promise was shown, either by express vote or contract, assuming a liability or obligation, legal or equitable, or else by some unequivocal act, such as advancing or expending money, or

[590] Pettibone v. Toledo, etc., R. Co., 148 Mass. 411, 414, per Field, J., citing Sawyer v. Hoag, 17 Wall. 610; Hatch v. Dana, 101 U. S. 205; Morgan v. Allen, 103 U. S. 498; Bartlett v. Drew, 57 N. Y. 587. In the principal case, the court held that subscribers for bonds were not in the same position as subscribers for stock.

[591] Andover & Medford Turnpike v. Hay, 7 Mass. 102, 107.

[592] Cottage St. Church v. Kendall, 121 Mass. 528, overruling dicta in Hanson Trustees v. Stetson, 5 Pick. 508, Ives v. Sterling, 6 Met. 310, 316, Watkins v. Eames, 9 Cush. 539; Sherwin v. Fletcher, 168 Mass. 413. See also Phillips Limerick Academy v. Davis, 11 Mass. 113; Williams College v. Danforth, 12 Pick. 541; New Bedford Turnpike v. Adams, 8 Mass. 138; Essex Turnpike v. Collins, 8 Mass. 292; Holmes v. Dana, 12 Mass. 192; Bryant v. Goodnow, 5 Pick. 228; Amherst Academy v. Cowls, 6 Pick. 427; Fisher v. Ellis, 3 Pick. 322; Thompson v. Page, 1 Met. 565; Mirick v. French, 2 Gray, 420; Ladies Collegiate Institute v. French, 16 Gray, 196; Athol Music Hall Co. v. Carey, 116 Mass. 471.

erecting a building, in accordance with the terms of the contract, and upon the faith of the defendant's promise." [593]

Nor is the mere organization of the corporation an acceptance of the offer to subscribe, and an acceptance can be made only by vote of the corporation, or by some officer of the corporation duly authorized to make it.[594]

A subscription paper made before the organization of the corporation, but after the act of incorporation is passed, is prima facie evidence that the persons whose names are thereon are members of the corporation.[595] So also is evidence that such persons petitioned for an act of incorporation, or, being within the description of persons incorporated, acted under it as by attending organization meetings, inviting and distributing votes and voting themselves.[596]

e. Promise to take shares and the promise to pay assessments.

The offer, when accepted, creates two distinct undertakings on the part of the subscriber; first, to take the shares, and, second, to pay any instalments of the price when duly called for. This is shown by the fact that a waiver of a condition on which one agrees to take stock is not a waiver of the same condition as regards payment.[597]

The present act gives to the corporation a right of action either before or after the sale of his rights. The subscriber is therefore liable to pay his assessments without any express promise.[598]

[593] Cottage St. Church v. Kendall, 121 Mass. 528, 530, per Gray C. J., citing the cases in the last note.

[594] Essex Turnpike v. Collins, 8 Mass. 292.

[595] Lexington, etc., R. Co. v. Chandler, 13 Met. 311.

[596] Ellis v. Marshall, 2 Mass. 269; Lexington, etc., R. Co. v. Chandler, 13 Met. 311.

[597] Atlantic Cotton Mills v. Abbott, 9 Cush. 423, 426.

[598] *Historical.* Formerly the law was otherwise. It was said in one case, for example: "It is the well settled law of this Commonwealth, that a subscription, authorized by law to lay assessments upon shares and to sell the shares for the non-payment of such assessments, does not impose any personal liability upon the subscriber to pay assessments upon the shares, unless he has expressly promised to do so." Katama Land Co. v.

The provision of the present act giving the corporation the right to collect subscriptions either by sale of the shares or by action, is an enactment of the previous law, holding that the remedies were cumulative and not mutually exclusive.[599]

Jernegan, 126 Mass. 155, 156, per Morton, J.; Mechanics, etc., Machine Co. v. Hall, 121 Mass. 272; Andover & Medford Turnpike v. Gould, 6 Mass. 40, 44; Franklin Glass Co. v. White, 14 Mass. 286; Cutler v. Middlesex Factory Co., 14 Pick. 483; Salem Mill Dam Corporation v. Ropes, 6 Pick. 23, 31; Atlantic Cotton Mills v. Abbott, 9 Cush. 423; Farmington Academy v. Allen, 14 Mass. 172, 175; Phillips Limerick Academy v. Davis, 11 Mass. 113; New Bedford Turnpike Co. v. Adams, 8 Mass. 138, 142; Belfast & Moosehead R. Co. v. Moore, 60 Me. 561; Belfast & Moosehead R. Co. v. Cottrell, 31 Me. 470. Cf. Bryant v. Goodnow, 5 Pick. 228; Bridgewater Academy v. Gilbert, 2 Pick. 579. Conversely, where a subscriber had promised to pay assessments he was liable in an action at law. New Bedford & Bridgewater Turnpike Co. v. Adams, 8 Mass. 138; Salem Mill Dam Corp. v. Ropes, 6 Pick. 23; Salem Mill Dam Corp. v. Ropes, 9 Pick. 187; Taunton & South Boston Turnpike v. Whiting, 10 Mass. 327; Worcester Turnpike v. Willard, 5 Mass. 80; Ripley v. Sampson, 10 Pick. 371; Chester Glass Co. v. Dewey, 16 Mass. 94; City Hotel v. Dickinson, 6 Gray, 586; Boston, etc., R. Co. v. Wellington, 113 Mass. 79. See Amherst Academy v. Cowls, 6 Pick. 427; Williams College v. Danforth, 12 Pick. 541.

The reason of this was, that unless a statute expressly gave the right of action against the subscribers, the corporation had no common-law right to assess the corporators and compel them to pay in an action at law. Andover & Medford Turnpike v. Gould, 6 Mass. 40, 43.

The general statutes of 1804 and 1808 gave no such power. Cutler v. Middlesex Factory, 14 Pick. 483; Franklin Glass Co. v. White, 14 Mass. 286; Andover Turnpike v. Gould, 6 Mass. 40; Andover Turnpike v. Hay, 7 Mass. 102; Bedford Turnpike v. Adams, 8 Mass. 138; Ripley v. Sampson, 10 Pick. 371.

Where a corporation could not sue directly to recover, it could not recover indirectly by setting off assessments against debts owing to the subscriber. Cutler v. Middlesex Factory Co., 14 Pick. 483.

A promise to pay assessments could be implied where the subscriber had been one of the incorporators and participated in their acts. Farmington Academy v. Flint, 14 Mass. 175. Cf. Holmes v. Dana, 12 Mass. 192; Bryant v. Goodnow, 5 Pick. 228. So where he had sent his servants to work out part of his subscription. Farmington Academy v. Allen, 14 Mass. 172.

[599] Worcester Turnpike v. Willard, 5 Mass. 80; New Bedford & Bridgewater Turnpike v. Adams, 8 Mass. 138, 141; City Hotel v. Dickinson, 6 Gray, 586; Boston, etc., R. Co. v. Wellington, 113 Mass. 79, 86, 87; Salem Mill Dam v. Ropes, 6 Pick. 23; Ripley v. Sampson, 10 Pick. 371. This was so under the prior law, even if the subscription paper contained an express promise to pay any deficiency arising from the sale of shares for less than par. Boston, etc., R. Co. v. Wellington, 113 Mass. 77, 86, 87.

f. Withdrawal and release of subscription.[600]

From the fact that a subscription is an offer, it may be withdrawn before the organization of the corporation and its acceptance of the offer.[601] "Until the organization of the corporation, the subscription is a mere proposition or offer, which may be withdrawn like any other unaccepted offer. Unless the signer is bound upon a contract, he is not bound at all. It is open to him to withdraw. It is not upon the ground that there was no sufficient consideration. The seal would do away with any doubt on that score. But it is on the ground that, for the time being and until the corporation is organized, the writing does not take effect as a contract, because the contemplated party to the contract, on the other side, is not yet in existence, and for this reason, there being no contract, the whole undertaking is inchoate and incomplete, and since there is no contract the other party may withdraw." [602]

A subscriber has, therefore, the right to withdraw although all of the other subscribers object,[603] and although action has been taken on the strength of the subscription.[604]

But, after the corporation is organized, the directors, in the absence of a statute, by-law or vote of the corporation, have no power to release a subscriber from his obligation as to any part of the shares for which he has subscribed.[605]

g. — Withdrawal, how made.

In order to effect a withdrawal of a subscription some unequivocal statement to that effect must be made to the proper

[600] As to compromise with a subscriber, see infra, under *y*.

[601] Hudson Real Estate Co. v. Tower, 156 Mass. 82; Hudson Real Estate Co. v. Tower, 161 Mass. 10; Essex Turnpike v. Collins, 8 Mass. 292; Bryant's Pond Steam Mill Co. v. Felt, 87 Me. 234; Munsy Traction Engine Co. v. Green, 143 Pa. St. 269.

[602] Hudson Real Estate Co. v. Tower, 156 Mass. 82, 83, 84, per Allen J.

[603] Hudson Real Estate Co. v. Tower, 161 Mass. 10.

[604] Hudson Real Estate Co. v. Tower, 161 Mass. 10; Hudson Real Estate Co. v. Tower, 156 Mass. 82.

[605] Hastings Lumber Co. v. Edwards, 188 Mass. 587. Cf. Penobscot, etc., R. Co. v. Dunn, 39 Me. 587; White Mountains Railroad v. Eastman, 34 N. H. 124; Meyer v. Blair, 109 N. Y. 600.

officer or officers;[606] but a direct personal notice of withdrawal to all of the subscribers is not necessary, nor is it necessary to wait for a general meeting of the subscribers, and to give the notice at such general meeting.[607] Ordinarily, a retraction is made to the same persons to whom the application for shares was made.[608]

The death of a subscriber before the formation of the corporation is a revocation of his subscription.[609] So likewise is his insanity.[610] But a mere refusal to pay calls is not a repudiation of a subscription.[611]

h. Evidence of subscription.

In general, the records of the corporation will show the names of the subscribers and the number of shares for which each agreed to be responsible.[612] But a subscription book which came into the possession of the corporation immediately after its organization, and which has always been considered by it to show the number of shares subscribed for, and on the faith of which the directors have levied an assessment, is prima facie evidence of subscriptions.[613]

It is to be noted that, under section 8 of the present law, the agreement of association is required to contain the amounts of stock subscribed for by the several incorporators and is to be signed by them. This supplies written evidence of the contract to subscribe, but is not inconsistent with a previous written agreement to subscribe. Such a written contract is not usually under seal, although as a seal imparts a consideration there may be an advantage in having seals attached.[614]

[606] Hudson Real Estate Co. v. Tower, 161 Mass. 10.

[607] Hudson Real Estate Co. v. Tower, 161 Mass. 10.

[608] Hudson Real Estate Co. v. Tower, 161 Mass. 10, 14. See Lindley, Part. (4th ed.) 99–105; Plank's Tavern Co. v. Bushhard, 87 Mich. 182.

[609] Hudson Real Estate Co. v. Tower, 161 Mass. 10, 14.

[610] Beach v. First Methodist Episcopal Church, 96 Ill. 177. See remarks of Allen, J., in Hudson Real Estate Co. v. Tower, 161 Mass. 10, 14.

[611] Electric Welding Co. v. Prince, 81 N. E. Rep. 306 (Mass. 1907).

[612] Central Turnpike v. Valentine, 10 Pick. 142.

[613] Marlborough Branch R. Co. v. Arnold, 9 Gray, 159.

[614] Rutherford v. Baptist Convention, 9 Ga. 54.

If the instrument be sealed, one common seal may be used.[615] Where stock is issued for property, services or expenses there will, ordinarily, be no subscription paper at all.

i. Defences to subscriptions.

As we have seen above, a subscription agreement is not binding upon a subscriber unless accepted by the corporation after its organization.[616] Further, in order to bind a subscriber, the corporation must be organized in the manner stated to the subscriber in the prospectus or charter.[617]

j. — Change in capitalization.

Thus, where one subscribes for a certain number of shares of a certain capital stock, he cannot be compelled to take the same number of shares after the subscribers have voted to double or otherwise alter the amount of the capital; for this makes a different contract.[618]

k. — Amount of other subscriptions.

Where a subscription paper is conditional upon sufficient sums being subscribed to carry out the purposes of the corporation,[619] or upon the whole number of shares contemplated being subscribed,[620] or a certain number of shares being subscribed,[621] no liability arises until the condition has been complied with. And, in the absence of any provision in the sub-

[615] Mill Dam Foundery v. Hovey, 21 Pick. 417, 428.

[616] Supra, under *b*.

[617] In addition to cases in the following sub-sections, see Middlesex Turnpike v. Locke, 8 Mass. 267.

[618] Katama Land Co. v. Jernegan, 126 Mass. 155, 157; Atlantic Cotton Mills v. Abbott, 9 Cush. 423; Katama Land Co. v. Holley, 129 Mass. 540. Cf. Agricultural Branch R. Co. v. Winchester, 13 Allen, 29, 31; Anglo-American Land Co. v. Dyer, 181 Mass. 593; Electric Welding Co. v. Prince, 81 N. E. Rep. 306 (Mass. 1907).

[619] People's Ferry Co. v. Balch, 8 Gray, 303; Springfield Street Ry. Co. v. Sleeper, 121 Mass. 29.

[620] Salem Mill Dam Co. v. Ropes, 9 Pick. 187; Salem Mill Dam v. Ropes, 6 Pick. 23.

[621] Boston, etc., R. Co. v. Wellington, 113 Mass. 79, 86. Cf. Electric Welding Co. v. Prince, 81 N. E. Rep. 306 (Mass. 1907).

scription paper providing for the corporation's beginning business before the entire capital was subscribed, it was presumed under the old law that every subscriber contemplated the subscription of the entire capital as a condition precedent to his own liability.[622]

Where by the charter the total amount of capital stock is fixed,[623] or is divided into a fixed number of shares,[624] no assessment can legally be levied for general purposes of the corporation until all the shares have been subscribed for. This is on the ground that no subscriber intends to be called upon to pay more of the necessary cost of the undertaking than the proportion which his shares bear to the total authorized capitalization.[625] But where the requisite number of shares has been subscribed for, the obligation of any subscriber to pay, when called upon to do so, is not dependent upon payment by other subscribers.[626]

In considering whether the stipulated number of shares have been subscribed for, cash subscriptions only can be considered, and stock to be issued to a contractor for work done cannot be included.[627] Nor can a subscription by one person for another without authority be included.[628]

On the other hand, if all the shares have been taken up by solvent persons, the unexpected failure of some of the subscribers, before or after the corporate powers were exercised, will not affect the power of the corporation to levy assessments.[629]

But even in a case where no assessment can be laid for the

[622] Cabot & West Springfield Bridge v. Chapin, 6 Cush. 50.

[623] Salem Mill Dam v. Ropes, 6 Pick. 23.

[624] Central Turnpike v. Valentine, 10 Pick. 142; Newburyport Bridge v. Story, 6 Pick. 45 note; Salem Mill Dam v. Ropes, 9 Pick. 187; Stoneham Branch Railroad v. Gould, 2 Gray, 277.

[625] Central Turnpike v. Valentine, 10 Pick. 142; Lexington, etc., R. Co. v. Chandler, 13 Met. 311.

[626] Hastings Lumber Co. v. Edwards, 188 Mass. 587, 594; Kennebec, etc., R. Co. v. Jarvis, 34 Me. 360, 363; Bucksport, etc., R. Co. v. Buck, 65 Me. 536, 541.

[627] Troy & Greenfield R. Co. v. Newton, 8 Gray, 596, 604.

[628] Salem Mill Dam v. Ropes, 9 Pick. 187.

[629] Ibid.

general objects of the corporation until all the capital has been subscribed, an assessment to cover the preliminary expenses of obtaining the act of incorporation and ascertaining the practicability and utility of the enterprise is valid.[630]

In general, the books of the corporation will show whether the whole number of shares have been taken up, the names of the respective proprietors and the number of shares for which each was responsible;[631] but if the books are destroyed, other clear and satisfactory evidence is required.[632]

l. — Change in time, rate or manner of payment.[633]

A subscription is supposed to be payable in cash or its equivalent.[634] When, therefore, certain shares are paid for in securities worth less than the par value of the subscription, other subscribers can use this as a defence.[635]

m. — Fixing of total number of shares.

If one has promised to pay assessments whenever a certain number of shares have been subscribed, it is no defence that the total number of shares had not been determined upon when the assessments were laid, when the number was not fixed by the act of incorporation, and the corporation did not commence business until the amount of shares prescribed by the charter was subscribed.[636]

The amount of the capital and the number of shares may be

[630] Salem Mill Dam v. Ropes, 6 Pick. 23; Central Turnpike v. Valentine, 10 Pick. 142.

[631] Central Turnpike v. Valentine, 10 Pick. 142. So, of a book adopted as a record by the corporation. Marlborough Branch R. Co. v. Arnold, 9 Gray, 159.

[632] Ibid.

[633] As to change in time, see Electric Welding Co. v. Prince, 81 N. E. Rep. 306 (Mass. 1907).

[634] Cabot & West Springfield Bridge v. Chapin, 6 Cush. 50; Troy & Greenfield R. Co. v. Newton, 8 Gray, 596.

[635] Cabot & West Springfield Bridge v. Chapin, 6 Cush. 50.

[636] Boston, etc., R. Co. v. Wellington, 113 Mass. 79, 86; Lexington, etc., R. Co. v. Chandler, 13 Met. 311; Penobscot, etc., R. Co. v. Bartlett, 12 Gray, 244 (case where maximum and minimum number of shares fixed by the legislature).

fixed by the charter,[637] or by the terms of the subscription books,[638] or the maximum may have been fixed by the charter, leaving the precise number of shares to be fixed by the directors.[639] In certain charters it has been provided that the corporation may go ahead and do business as soon as a certain number of shares are subscribed.[640]

Where the charter provides a maximum number of shares and that the number shall be determined from time to time by the directors, no assessment is valid until the number of shares has been determined.[641] And the vote of the directors to close the subscription books for shares on a given day, is in effect a vote fixing the number of shares at the number then subscribed for.[642]

Where neither the charter nor the subscription paper fixes the total amount of capital stock, such fixing is not a condition precedent to liability upon a subscription, even though a limit to the possible capitalization exists by law;[643] and where new stock is issued to stockholders at a certain price there is no implied condition that the whole amount of new stock voted will in fact be issued, and a subscriber cannot on that ground sue for the return of money paid for his new shares.[644]

n. — Alteration, amendment and repeal of charters.

Since 1831, all charters have been subject to alteration, amendment and repeal, within certain limits, at the pleasure of the legislature;[645] and stockholders and subscribers for stock

[637] Salem Milldam v. Ropes, 6 Pick. 23; Stoneham Branch R. Co. v. Gould, 2 Gray, 277; Troy, etc., R. Co. v. Newton, 8 Gray, 596, 598.

[638] Cabot, etc., Bridge v. Chapin, 6 Cush. 50; Atlantic Cotton Mills v. Abbott, 9 Cush. 423; Troy, etc., R. Co. v. Newton, 8 Gray, 596, 598.

[639] Troy, etc., R. Co. v. Newton, 8 Gray, 596, 598; Lexington, etc., R. Co. v. Chandler, 13 Met. 311; Worcester, etc., R. Co. v. Hinds, 8 Cush. 110.

[640] Lexington, etc., R. Co. v. Chandler, 13 Met. 311.

[641] Troy, etc., R. Co. v. Newton, 8 Gray, 596; Worcester, etc., R. Co. v. Hinds, 8 Cush. 110.

[642] Lexington & West Cambridge R. Co. v. Chandler, 13 Met. 311.

[643] City Hotel v. Dickinson, 6 Gray, 586.

[644] Nutter v. Lexington, etc., R. Co., 6 Gray, 85.

[645] Supra, § 2.

are presumed to assent to such legislative changes.[646] This principle applies to the alteration of locations of public service corporations,[647] to extensions of time for completing construction of plant,[648] and to reductions of the capital stock.[649]

o. — Miscellaneous defences.

The following matters have been held to be no defence to subscription agreements:

(1) That, where a railroad was authorized to build its road in sections and one section had been completed, subscriptions were obtained for the second and third sections, it not appearing whether the subscriptions were to be expended upon one section or both, or how they were to be divided between the two.[650]

(2) That the construction of a railroad was commenced before twenty per cent. of each share had been paid in, contrary to the provisions of the charter.[651]

(3) That the subscription paper allowed interest to subscribers.[652]

(4) That a contractor who had done work for a corporation was to receive a portion of his pay in stock, as he had subscribed for that amount of stock and the transaction had been made in good faith and the work honestly performed; for such a payment in labor was equivalent to a cash payment and did not injure other subscribers.[653]

(5) That a large and important part of a building erected by a hotel company was constructed and leased for stores.[654]

(6) That a subscriber received no notice of a meeting and did not attend the same, where there was an agreement to pay a subscription to certain persons who conveyed valuable prop-

[646] Agricultural Branch R. Co. v. Winchester, 13 Allen, 29, 33; South Bay Meadow Dam Co. v. Gray, 30 Me. 547.

[647] See supra, in this section.

[648] Agricultural Branch R. Co. v. Winchester, 13 Allen, 29.

[649] Ibid.

[650] Agricultural Branch R. Co. v. Winchester, 13 Allen, 29.

[651] Ibid.

[652] Ibid.

[653] Boston, etc., R. Co. v. Wellington, 113 Mass. 79, 86.

[654] City Hotel v. Dickinson, 6 Gray, 586.

erty to a corporation chartered in pursuance of a vote passed at such meeting.[655]

(7) That the corporation failed to invest its capital in certain securities within a given time, as required by its charter.[656]

(8) That the promoters erroneously, but in good faith, exaggerated the amount of water power which could be created by a corporation to be organized.[657]

(9) That the assessment was not necessary or wise. In the absence of fraud, if the directors have the power to make the assessment, its wisdom is not open to review by the courts.[658]

(10) That the subscriber by mistake subscribed for more stock than he intended, if he suffers the corporation to act on his subscription.[659]

(11) That a subscriber who attended a meeting where certain persons agreed in writing to pay a certain sum when an avenue should be "laid out," in consideration of the plaintiff's acting as a member of a committee to secure the laying out, intended his subscription to pay only for land, and that no land was ever purchased.[660]

On the other hand, a demand for a subscription made by directors illegally elected is not good; the subscriber can defend himself against an action based thereon; and the doctrine of the validity of acts done *colore officii* has no application.[661]

p. — Waiver of defences.

Where an assessment cannot be lawfully levied until certain conditions precedent have been complied with, the corporation must show either compliance or a waiver by the subscribers whose assessments it desires to collect.[662]

[655] Brewer v. Stone, 11 Gray, 228.

[656] Little v. Obrien, 9 Mass. 423.

[657] Salem Mill Dam v. Ropes, 9 Pick. 187.

[658] 2 Thompson, § 1710; Cook, 5th ed., § 113; Oglesby v. Attrill, 105 U. S. 605; Anglo-American Land, etc., Co. v. Dyer, 181 Mass. 593.

[659] Diman v. Providence R. Co., 5 R. I. 130. Where, however, the subscriber mistakes the nature of the contract entirely it is otherwise. See Jackson v. Haynes, 12 Johns. (N. Y.) 469; Schuylkill County v. Copley, 67 Pa. St. 386; Rockford R. Co. v. Shunick, 65 Ill. 223, 228, 229.

[660] Stillings v. Timmins, 152 Mass. 147.

[661] People's Mutual Ins. Co. v. Westcott, 14 Gray, 440.

[662] Central Turnpike v. Valentine, 10 Pick. 142, 146.

The payment of certain assessments on the stock is not a waiver of the right to insist on such a defence as the change in capitalization in an action for a subsequent assessment,[663] although taking the stock is a waiver of the right to refuse to take shares.[664]

On the other hand, if a subscriber, knowing that the requisite subscriptions have not been made to fill up the capital, attends meetings of the corporation, co-operates in votes for expending money and for making contracts, and in other acts which assume an intention on the part of subscribers to proceed with the stock partially taken up, he is estopped from setting up a defence on that ground.[665]

If a subscriber to an agreement fixing the capital at fifty thousand shares, has in the same agreement consented that the first issue shall be twenty-five thousand shares with power to increase the number, he has waived the right to object in a suit for his subscription, that the whole fifty thousand have not been subscribed for.[666]

q. Calls or assessments.

A "call" may mean either the resolution of the directors that an assessment be levied, the notice to stockholders regarding it, or the time when it becomes payable.[667] The term "assessment" has the same meaning as call, and also sometimes refers to payments in excess of the par value of shares for the purpose of paying creditors or providing working capital.[668]

The present act authorizes a demand for the subscription to be made, either in accord with the by-laws, or, if there is no by-law, then by seven days' notice mailed to each subscriber.[669]

This demand seems to be a condition precedent to the sale of the rights of subscription as provided for in this section.

[663] Katama Land Co. v. Jernegan, 126 Mass. 155, 157; Atlantic Cotton Mills v. Abbott, 9 Cush. 423; Katama Land Co. v. Holley, 129 Mass. 541.

[664] Atlantic Cotton Mills v. Abbott, 9 Cush. 423.

[665] Cabot & West Springfield Bridge v. Chapin, 6 Cush. 50, 53.

[666] Anglo-American Land, etc., Co. v. Dyer, 181 Mass. 593.

[667] Ambergate, etc., R. Co. v. Mitchell, 4 Exch. 540.

[668] Omo v. Bernart, 108 Mich. 43.

[669] Cf. Hastings Lumber Co. v. Edwards, 188 Mass. 587, 593.

Apart from these provisions, however, no call is necessary where the contract of subscription provides for payment of the subscription immediately or at a stated time or times;[670] and the same is true where there is a similar provision in the charter.[671]

Calls must be made on all subscribers alike, except in cases where some have already paid more than others.[672]

Interest.

Interest on subscriptions does not begin to run until there has been a failure to pay after a call, or, where there has been no call, there has been a failure to pay at the time stipulated.[673]

r. Determination of the corporation to collect subscriptions.

Where directors vote that the treasurer be authorized and instructed to obtain the assistance of A. B., in making collections of unpaid subscriptions to the capital stock, and that he be authorized and instructed to obtain legal counsel as to the proper manner to collect unpaid assessments, these votes authorize A. B. to sue subscribers in the name of the corporation.[674]

A vote of directors illegally elected is not binding on subscribers.[675]

s. Right of the corporation to sue for subscriptions.

In bringing an action, just as in selling the shares, all the conditions precedent required by the statute or the by-laws must be fulfilled.[676]

[670] Northwood Union Shoe Co. v. Pray, 67 N. H. 435; Lake Ontario, etc., R. Co. v. Mason, 16 N. Y. 451; Estett v. Knightstown, etc., Turnpike Co., 41 Ind. 174.

[671] Phœnix Warehousing Co. v. Badger, 67 N. Y. 294.

[672] Great Western Telegraph Co. v. Burnham, 79 Wis. 47; Brockway v. Gadsden, etc., Co., 102 Ala. 620; Pike v. Bangor R. Co., 68 Me. 445.

[673] Upton v. Burnham, 3 Biss. 431; Gould v. Oneonta, 71 N. Y. 298. As to interest payable to subscribers, see infra, under *v*.

[674] Athol Music Hall Co. v. Carey, 116 Mass. 471.

[675] People's Mutual Insurance Co. v. Westcott, 14 Gray, 440.

[676] Grosse Isle Hotel Co. v. I'Anson, 42 N. J. L. 10.

Where subscribers "agree to pay the sums set against their respective names, to such persons as shall be authorized to receive the same" for a certain purpose, it seems that a corporation organized between the date of the instrument, and the time of its actual execution cannot sue the subscribers upon it, as no contract was made with it.[677] But an agreement of subscribers "to and with each other" to form a corporation, and to "pay to the treasurer of said corporation" the amounts set against their respective names, is to be construed, when accepted, according to its purpose and intent, and the practical necessity of the case, as a contract with the corporation as the common representative of the several associates.[678]

A subscription and promise to pay assessments to A. B., agent of the corporation to procure subscriptions, is a promise to the corporation, which may sue upon the agreement.[679] But the agent, as such, cannot sue in his own name for the unpaid subscriptions.[680] A promise "to pay into the funds of said company in such instalments as the president and directors may, under the provisions of law, require" a certain sum for each share subscribed for, is a promise to the corporation, which may maintain an action thereon, the capital not being fixed by the charter or subscription paper to any precise amount.[681]

While, in general, the corporation is the proper party to sue,[681a] yet where the subscribers agree to pay to such persons as may be appointed by a majority of the shareholders to receive subscriptions, the persons appointed are the proper plaintiffs and not the corporation.[682]

[677] People's Ferry Co. v. Balch, 8 Gray, 303, 311.

[678] Athol Music Hall v. Carey, 116 Mass. 471. Cf. Thompson v. Page, 1 Met. 565; Ives v. Sterling, 6 Met. 310.

[679] Gilmore v. Pope, 5 Mass. 491; Taunton & South Boston Turnpike v. Whiting, 10 Mass. 327.

[680] Gilmore v. Pope, 5 Mass. 491.

[681] City Hotel v. Dickinson, 6 Gray, 586. This distinguishes the case from Atlantic Cotton Mills v. Abbott, 9 Cush. 423, where the capital was fixed and subsequently varied.

[681a] Hastings Lumber Co. v. Edwards, 188 Mass. 587, 591, and cases in notes, supra.

[682] Ives v. Sterling, 6 Met. 310, 317; Thompson v. Page, 1 Met. 565;

t. — Action for deficiency.

Where a statute gives the corporation the power to levy assessments, to sell the stock for non-payment and to hold the owner liable for any deficiency, an action for the deficiency is based upon the statute and not upon the contract of subscription.[683]

It is therefore not necessary or proper to set forth the contract of subscription in the declaration, or aver performance of the conditions of the contract.[684]

u. — Limitation of action.

If an action for a subscription is brought within the period of limitation after a call has been made, it is no objection that the call is not made within that period after the subscription.[685] In case of bankruptcy of the corporation, the action must be brought within the period of limitation after the excess of debts over assets has been ascertained.[686]

v. Interest upon subscriptions.[687]

It is no defence to an action for a subscription that the subscription paper recommends payment of interest to subscribers on the amounts paid by them.[688]

Where a railroad corporation agreed that each subscriber "shall have the privilege of paying in at any time the whole or any part of his subscription, and shall receive interest thereon until the road goes into operation," the interest is not payable until the road actually goes into operation, as any other construction might result in confusion and financial embarrassment to the corporation.[689] And where the directors vote that

Watkins v. Eames, 9 Cush. 537; Davis v. Smith American Organ Co., 117 Mass. 456; Sherwin v. Fletcher, 168 Mass. 413. Cf. People's Ferry Co. v. Balch, 8 Gray, 303, 311, cited supra.

[683] Troy & Greenfield R. Co. v. Newton, 1 Gray, 544.

[684] Troy v. Greenfield R. Co. v. Newton, 1 Gray, 544; Amherst, etc., R. Co. v. Watson, 4 Gray, 61. As to declaration, see R. L., c. 173, § 2, cl. 10.

[685] Hawkins v. Glenn, 131 U. S. 319.

[686] Hale v. Cushman, 96 Me. 148.

[687] As to interest on calls, see supra, under *q*.

[688] Agricultural Branch R. Co. v. Winchester, 13 Allen, 29.

[689] Waterman v. Troy & Greenfield R. Co., 8 Gray 433; Wright v. Vermont, etc., R. Co., 12 Cush. 68.

interest on subscriptions shall cease at a certain time, such vote does not make the interest payable presently.[690]

Where interest is voted to be paid upon the express condition, that, if there is not money enough in the treasury of the corporation to pay the interest in full at the time fixed for payment, it shall be paid pro rata, one seeking to recover the full amount of interest must prove that there were sufficient funds, and this is to be decided by the court, and not by the board of directors.[691] If it turns out that there are no funds at all in the treasury, no action can be maintained by a subscriber.[692]

w. Forfeiture of subscriptions.

If a subscriber fails to perform his part of the conditions specified in the subscription paper, he cannot complain if the corporation refuse to deliver him the shares upon tender of payment, even though his name is entered as a subscriber in a subscription book, and he is requested to pay for the shares subscribed for by him, and the shares are afterward allowed to be taken by another person without selling them under the statute for non-payment of assessments.[693] And a subscriber who does not comply with the conditions as to payment cannot maintain a bill for specific performance on tender of the amount due and interest, nor, if the corporation has sold his shares as not taken, can he maintain a suit as against a trustee for the improper sale of the trust property.[694]

x. Sale of shares for non-payment of subscriptions.

The statute provides that ten day's notice of the time and place of sale must be given to the subscriber. It was held in one case that a notice of sale by a certain auctioneer which did

[690] Wright v. Vermont, etc., R. Co., 12 Cush. 68.

[691] Barnard v. Vermont, etc., R. Co., 7 Allen, 512.

[692] Cunningham v. Vermont, etc., R. Co., 12 Gray, 411.

[693] Perkins v. Union Button-Hole, etc., Co., 12 Allen, 273. For a case where a promoter was held not liable to a subscriber for acts of the corporation, under a special agreement, see Field v. Pierce, 102 Mass. 253. That the corporation, after allotting the shares to others, cannot sell the shares and sue the original subscriber for a deficiency, see Athol & Enfield R. Co. v. Prescott, 110 Mass. 213.

[694] Sewall v. Eastern R. Co., 9 Cush. 5.

not name the place of sale was insufficient, although the auctioneer had long been settled in the place from which the notice is dated.[695] And, in general, the terms of the statute must be followed exactly to make a sale valid.[696]

Where a subscriber refused to pay assessments, and the corporation procured other subscriptions to the full amount of the capital stock, it was held that it could not thereafter sell the subscriber's shares and sue him for the deficiency, even though no vote had been passed declaring his shares forfeited.[697]

Right of purchaser to certificate.[698]

Where shares are sold for non-payment of an assessment, the purchaser is, of course, entitled to a certificate. If, however, the corporation refuses to issue one, his remedy is an action for damages, and mandamus will not lie to compel the issuing of the certificate.[699]

y. Compromise with subscriber.

Whether a company can make a compromise of assessments with its stockholders has never been passed upon in this State, but it would seem that no such contract could be valid as against its creditors.[700]

z. Recovery of subscriptions.

Where one has been induced to subscribe by fraudulent representations, and has paid his subscription to the person holding the office of treasurer, he cannot rescind the contract of subscription and sue the other shareholders for money had and received, even if the incorporation is invalid. His remedy, if

[695] Lexington, etc., R. Co. v. Staples, 5 Gray, 520.

[696] Lexington, etc., R. Co. v. Staples, 5 Gray, 520; Portland, etc., R. Co. v. Graham, 11 Met. 1.

[697] Athol, etc., R. Co. v. Prescott, 110 Mass. 213.

[698] Cf. infra, § 26, *d*.

[699] Murray v. Stevens, 110 Mass. 95; Stackpole v. Seymour, 127 Mass. 104.

[700] See Anglo-American Land, etc., Co. v. Dyer, 181 Mass. 593, 598; Sawyer v. Hoag, 17 Wall. 610, 619.

any, is in tort for the fraud, or in equity to have the contract rescinded.[701]

§ 16. Payment of stock by instalments.

"If stock is issued payable by instalments, the directors may require the payment of subscriptions for stock in such proportions and at such times and places as they deem proper, by making demand therefor according to the by-laws and by a notice mailed to each stockholder at least two weeks before any instalment is payable. If a stockholder neglects to pay an instalment for thirty days after the time limited in such notice for payment, the treasurer of the corporation may sell such stockholder's shares by public auction, and, out of the proceeds of such sale, shall pay to the corporation all instalments then due from such stockholder with interest and incidental charges. A notice stating the time and place of such sale and the amount of the instalment due and payable and also the number of the certificate and number of shares of stock thus offered for sale shall be sent by the treasurer by mail not less than ten days prior to such sale to such stockholder and also to the person who originally subscribed to the said delinquent stock. Upon the sale of such stock as aforesaid, the directors shall transfer the shares so sold to the purchaser, who shall be entitled to a certificate therefor; and thereupon, the outstanding certificate shall be void. The balance of the proceeds of such sale shall be held by the corporation for such stockholder, his representatives or assigns, and be paid to him or them at any time upon surrender and delivery to the corporation of his certificate. If no person offers an amount sufficient to pay all instalments due upon such stock with interest and incidental charges, it shall not be sold, but the delinquent stockholder shall be liable to the corporation in an action at law for such instalments, interest and incidental charges, and if a judgment rendered in such action remains unsatisfied for thirty days, the original subscriber shall be so liable. Instead of offering such stock for sale, the directors, at the expiration of the time limited in the notice for payment of such instalments, may proceed by an action at law against the delinquent stockholder, and, if a judgment rendered against him in such action remains unsatisfied for thirty days, against the original subscriber, for the recovery of such instalments, interest

[701] Perry v. Hale, 143 Mass. 540.

and incidental charges. The delinquent stockholder or the original subscriber, as the case may be, upon the payment of such instalments, interest and incidental charges, or of the judgment therefor, shall be entitled to a certificate of the stock, so stamped as to indicate the payments made, and, thereupon, the original certificate for such stock shall be void. If a judgment rendered in an action against the original subscriber remains unsatisfied for thirty days, said stock shall be forfeited to the corporation, an entry of transfer to it shall be made on its books, and, thereupon, the original certificate shall be void. While the stock remains the property of the corporation, no dividends shall be declared nor instalments paid upon it; but it shall remain subject to the control of the corporation according to its by-laws." [702]

This section is also new; for, previously, stock issued for cash must have been fully paid up before the corporation was allowed to do business.[703] For decisions under this section, see also cases under the previous section.

a. Liability for unpaid instalments after transfer.

The statute provides that, where a stockholder other than the original subscriber fails to pay an instalment within thirty days after a judgment against him, the original subscriber shall be liable.

As between a vendor and a vendee of shares, the latter is liable for an assessment laid after the sale. "In the absence of any express stipulation, the property must be understood to pass in the condition in which it was at the time of the sale. The duty of the vendor would be fulfilled if he discharged all such incumbrances as existed at that time." [704]

The result is that an original subscriber remains at least secondarily liable in any event; but a transferee from an original subscriber can discharge himself from liability for future assessments by transferring his stock.[705]

[702] St. 1903, c. 437, § 16.

[703] R. L., c. 110, § 43.

[704] Brigham v. Mead, 10 Allen, 245, 246, per Chapman, J.; Hood v. McNaughton, 54 N. J. L. 425, 428.

[705] Cf. Hood v. McNaughton, 54 N. J. L. 425.

C. OFFICERS OF THE CORPORATION.

§ 17. What officers shall be chosen.[706]

"The business of every corporation shall be managed and conducted by a president, a board of not less than three directors, a clerk, a treasurer and such other officers and such agents as the corporation by its by-laws shall authorize." [707]

This is one of the provisions of law indicating that a manufacturing corporation cannot enter into a partnership; for, if it could, a partner would not be acting as an officer or agent of the corporation, but as a principal in a society where all are equals.[708]

a. Officers, generally.

The officers of a company are such officers as are necessary to the carrying on of its corporate existence.[709] Thus an attorney, though often necessary for the proper conduct of a corporation's business, not being necessary to its existence, cannot be made a separate officer under the by-laws.[710]

Unless otherwise provided, one person may hold several offices.[711]

[706] As to breach of fiduciary relations by officers, see infra, § 19, *d*.

[707] St. 1903, c. 437, § 17; R. L., c. 110, § 22; Pub. St., c. 106, §§ 23, 25; St. 1874, c. 349, § 1, cl. 1; St. 1870, c. 224, §§ 15, 17; St. 1866, c. 290, § 3; Gen. St., c. 60, §§ 3, 5; Rev. St., c. 38, §§ 2, 3; St. 1829, c. 53, § 1; St. 1808, c. 65, § 1.

Citations. — Pub. St., c. 106, §§ 23, 25: American Tube Works v. Boston Machine Co., 139 Mass. 10, 29 N. E. Rep. 63; Saltmarsh v. Spaulding, 147 Mass. 227, 17 N. E. Rep. 316; Dunphy v. Traveller Newspaper Association, 146 Mass. 498, 16 N. E. Rep. 426; Evans v. Boston Heating Co., 157 Mass. 38, 31 N. E. Rep. 698; Citizens' Gas Light Co. v. Wakefield, 161 Mass. 438, 37 N. E. Rep. 444; Fillebrown v. Hayward, 190 Mass. 478.

St. 1870, c. 224, §§ 15, 17: American Tube Works v. Boston Machine Co., 139 Mass. 10, 29 N. E. Rep. 63; Evans v. Boston Heating Co., 157 Mass. 40, 31 N. E. Rep. 698.

St. 1866, c. 290, § 3: Ward v. Brigham, 127 Mass. 24.

Rev. St., c. 38, §§ 2, 3: Whittenton Mills v. Upton, 10 Gray, 595; Boston Acid Mfg. Co. v. Moring, 15 Gray, 211; Dunphy v. Traveller Newspaper Ass'n, 146 Mass. 498, 16 N. E. Rep. 426.

[708] Whittenton Mills v. Upton, 10 Gray, 595.

[709] 2 Op. Atty.-Gen. 230.

[710] Ibid.

[711] Sargent v. Webster, 13 Met. 497 (treasurer and director).

b. Qualifications.

Acceptance of an office may be presumed from entering upon its duties.[712] Not infrequently special statutes or by-laws require certain special qualifications for officers or some of them; thus the present act requires directors to be stockholders,[713] and it is not uncommon to provide that certain officers shall be required to own a certain number of shares, or to have been a stockholder for a certain period before election. Such provisions must be complied with and the election of a person not having the requisite qualifications is void,[714] and if an officer ceases to be qualified his office usually becomes vacated thereby.[715] Apart from special provisions any one may be an officer,[716] including a person holding stock as a fiduciary.[717]

The clerk of the corporation must be a resident of the Commonwealth,[718] and the corporation must always keep a clerk in the Commonwealth.[719]

c. De facto officers.

De facto officers are those holding office under color of title, but who are illegally or irregularly elected, appointed or qualified.[720]

In so far as they create rights in favor of bona fide third persons their acts are as binding as if they were officers *de jure;*[721] but, where they act fraudulently and the third persons

[712] Blake v. Bayley, 16 Gray, 531 (director); Delano v. Smith Charities, 138 Mass. 63 (clerk).

[713] Unless the by-laws provide otherwise, St. 1903, c. 437, § 18. Cf. Wight v. Springfield, etc., R. Co., 117 Mass. 226; Sargent v. Webster, 13 Met. 497, 504; Penobscot Railroad v. Dummer, 40 Me. 172, 174.

[714] Jenner's Case, L. R. 7 Ch. Div. 132; Barber's Case, L. R. 5 Ch. Div. 963.

[715] Chemical Bank v. Colwell, 132 N. Y. 250.

[716] Wight v. Springfield, etc., R. Co., 117 Mass. 226.

[717] Re Santa Eulalia, etc., Mining Co., 51 Hun, 640.

[718] See infra, § 18.

[719] St. 1907, c. 282, § 2.

[720] Merchants' Bank v. Citizens' Gas Light Co., 159 Mass. 505; Simpson v. Garland, 76 Me. 203.

[721] Merchants' Bank v. Citizens' Gas Light Co., 159 Mass. 505; Hudson v. J. B. Parker Machine Co., 173 Mass. 242; Hamilton Trust Co. v. Clemes, 163 N. Y. 423; Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548; Savage v. Miller, 56 N. J. Eq. 432.

know of the fraud, the corporation is not bound by their acts. Thus, a fraudulent mortgage may be set aside in equity at the suit of a stockholder and creditor,[722] and cannot be enforced for any part of the consideration.[723]

On the other hand, where certain persons are acting as *de facto* officers and agents of the corporation, and no other persons claim the right to act in that capacity, one indebted to the corporation cannot set up the illegality of their election, as a defence.[724]

In one case, where the by-laws required a majority of the stock to be represented at an election, it was held that directors elected by a minority of the stock were not even *de facto* officers, and that the old board held over.[725] And the same was held where additional directors were elected at a special meeting, in the call for which no mention was made of the proposed increase.[726]

Mandamus will lie by the corporation to oust *de facto* officers who refuse to deliver over books and papers to regularly elected officers.[727]

d. Salary of officers.[728]

In the absence of express provisions in the by-laws, salaries are fixed by the board of directors.[728a]

Apart from express agreement, directors or other officers are not entitled to any compensation for services in the regular course of their employment.[729] And the fact that an officer

[722] Lamb v. McIntire, 183 Mass. 367.

[723] Lamb v. McIntire, 183 Mass. 367; Richardson v. Sibley, 11 Allen, 65, 72 (public service corporation).

[724] Granville Charitable Assoc. v. Baldwin, 1 Met. 359.

[725] Ellsworth Co. v. Faunce, 79 Me. 440.

[726] People's Mutual Ins. Co. v. Westcott, 14 Gray, 440.

[727] American Railway-Frog Co. v. Haven, 101 Mass. 398.

[728] See also infra, § 18, and as to the president, infra in this section, under *e*.

[728a] See infra, § 19, *a*.

[729] Citizens Nat. Bank v. Elliott, 55 Iowa, 104; Bartlett v. Mystic River Corp., 151 Mass. 433; Henry Wood's Sons Co. v. Schaefer, 173 Mass. 443; Sawyer v. Pawners' Bank, 6 Allen, 207; Pew v. Gloucester Nat. Bank, 130 Mass. 391. Cf. Pray v. Standard Electric Co., 155 Mass. 561.

tells some of the directors that he expects compensation, to which they make no reply, is not sufficient to establish such implied contract.[730]

But a contract may be implied to pay for services outside of official duty, rendered with the consent of the board of directors who supposed he would claim compensation.[731] And this is so even though the directors have previously voted that no compensation shall be paid unless previously fixed by the board, if the officer in question did not know of the vote.[732]

The fact that an officer has previously been paid a certain sum for similar services is competent, but not conclusive, upon the question what his services are worth.[733]

However valuable services of officers may be in advancing the business interests of a corporation, they cannot appropriate its funds as payment for their services, unless authorized in proper form by the corporation;[734] and the officer interested should not vote on his own salary, and it should appear in the records that he does not do so.[735] If money is taken wrongfully for salaries, the corporation, or upon its bankruptcy its trustees, can recover back any excess above a reasonable remuneration for the services performed;[736] but, where no fraud actual or constructive is found, the vote of the directors fixing a salary protects the officer.[737]

[730] Sawyer v. Pawners' Bank, 6 Allen, 207. See Pew v. Gloucester Nat. Bank, 130 Mass. 391.

[731] Bartlett v. Mystic River Corporation, 151 Mass. 433; Lafayette R. Co. v. Cheney, 87 Ill. 446.

[732] Bartlett v. Mystic River Corporation, 151 Mass. 433.

[733] Bartlett v. Mystic River Corporation, 151 Mass. 433; Tatterson v. Suffolk Manuf. Co., 106 Mass. 56.

[734] Von Arnim v. American Tube Works, 188 Mass. 515; Fillebrown v. Hayward, 190 Mass. 472; Sawyer v. Pawners' Bank, 6 Allen, 207, 209; Pew v. First National Bank of Gloucester, 130 Mass. 391; Putnam v. Gunning, 162 Mass. 552; Re Newman, [1895] 1 Ch. 674.

[735] A vote of a board of three directors, fixing the salary of the treasurer, is not invalidated, in the absence of fraud, by the fact that the treasurer and the treasurer's daughter are members of the board. Fillebrown v. Hayward, 190 Mass. 472. Cf. Gay v. Fair, 175 Mass. 521, 527.

[736] Fillebrown v. Hayward, 190 Mass. 472, 478.

[737] Fillebrown v. Hayward, 190 Mass. 472, 478; Fort Payne Rolling Mill v. Hill, 174 Mass. 224.

The vote of a corporation, fixing the salary of an officer is not a contract with such officer until communicated to him and accepted by him; and extrinsic evidence is competent to show whether there was in fact such an acceptance.[738] But if a contract is once made, as by re-electing an officer after a vote fixing the salary for the new term, it cannot be rescinded.[739]

e. President.

The president of a corporation is not, *ipso facto,* entitled to a salary or a compensation; and where one is both president and general manager, the presumption is that any salary he receives is for his services as general manager.[740]

A by-law providing that the president shall have a casting vote at stockholders' meetings does not entitle him to cast a deciding vote after he has already voted once.[741]

It is not necessary that the president should be present at meetings of the board of directors.[742]

The president has no implied authority to commence an action for the corporation,[743] nor to execute mortgages and other instruments on behalf of the corporation;[744] nor to foreclose a mortgage made to it.[745] But he may be authorized by the directors to do these things, either by a formal vote or by knowledge and acquiescence.[746] And where he is authorized

[738] Sears v. Kings Co. Elevated R. Co., 152 Mass. 151.

[739] Kimball v. New England Roller Grate Co., 168 Mass. 32 (president). As to waiving notice of termination of employment, see Nashua & Lowell R. Co. v. Paige, 135 Mass. 145.

[740] Bussell Trimmer Co. v. Coburn, 188 Mass. 254. See also supra, under *d.*

[741] Lamb v. McIntire, 183 Mass. 367.

[742] Sargent v. Webster, 13 Met. 497.

[743] Ashuelot Manuf. Co. v. Marsh, 1 Cush. 507.

[744] Smith v. Smith, 117 Mass. 72; England v. Dearborn, 141 Mass. 590; Bi-Spool Sewing Machine Co. v. Acme Mfg. Co., 153 Mass. 404.

[745] New England Mutual Life Ins. Co. v. Wing, 191 Mass. 192.

[746] Topping v. Bickford, 4 Allen, 120; Sherman v. Fitch, 98 Mass. 59; Narragansett Bank v. Atlantic Silk Co., 3 Met. 282; Merchants' Bank v. Citizens' Gas Light Co., 159 Mass. 505; Simmons v. Shaw, 172 Mass. 516. See Swasey v. Emerson, 168 Mass. 118; Scribner v. Flagg Manufacturing Co., 175 Mass. 536; Beacon Trust Co. v. Souther, 183 Mass. 413; New England Mutual Life Ins. Co. v. Wing, 191 Mass. 192.

to do certain acts, he is thereby authorized to act for the corporation in matters incidental thereto. Thus, where a president was authorized to sell and lease lands, it was held that he had authority to point out the boundaries of lots, and his declarations made while negotiating a lease were admissible against the corporation.[747] And the president who is the chief executive of a corporation, the business of which is investment in mortgages, has authority to foreclose a mortgage by writ of entry.[748]

Where a president acts in his own interest and not in the interest of the corporation, the latter is not chargeable with his knowledge of facts adverse to its interests.[749]

Where the president of a corporation continued to act as such for two years after his election, and assumed to execute a vote of the corporation, four years after his election, this tends to show that he still held the office;[750] and a mortgage executed by the president on behalf of a corporation and bearing the corporate seal is *prima facie* evidence of his authority to execute it.[751]

f. Board of directors.[752]

In the absence of evidence to the contrary, it is presumed that there are at least three directors as required by this section,[753] and if less than the required number are chosen, the election of those chosen holds good, and the vacancies may be filled later.[754] Vacancies are to be filled as provided in the by-laws, or, if the by-laws are silent, they may be filled by the board.[755]

[747] Holmes v. Turners Falls Co., 150 Mass. 535.

[748] Trustees of Smith Charities v. Connolly, 157 Mass. 272.

[749] Corcoran v. Snow Cattle Co., 151 Mass. 74.

[750] Clark v. Warwick Cycle Manuf. Co., 174 Mass. 434.

[751] Hamilton *v.* McLaughlin, 145 Mass. 20.

[752] For the Liability of Officers and Agents, see infra, under *n;* for the Limitation of Powers of Directors and Breach of Fiduciary Relations, see infra, § 19, *b*, *d*.

[753] Dunphy v. Traveller Newspaper Association, 146 Mass. 498, 16 N. E. Rep. 426.

[754] Re Union Ins. Co., 22 Wend. 291.

[755] See infra, § 18.

Acceptance of the office is necessary to constitute one a director,[756] but will be presumed;[757] although, if the election is declined, the mere fact that the person elected attends directors' meetings is not conclusive.[758]

A director may resign by verbal statement, and acceptance of his resignation may be also verbal.[759] Acceptance is not necessary.[760]

Under section 18 of the present act "every director, unless the by-laws otherwise provide, shall be a stockholder,"[761] and if he ceases to hold stock he becomes thereby disqualified.

All corporate contracts are to be made by the directors; and, if the contracts are within the express or implied powers of the corporation, the stockholders need not be consulted,[762] and the directors have full powers unless restricted by the charter or by-laws.[763]

g. Treasurer.

If a corporation permits its treasurer to act as its general fiscal agent, and holds him out to the public as having the general authority implied from his official name and character, and by its silence and acquiescence suffers him to draw and accept drafts, and to endorse notes payable to the corporation, it is bound by his acts done within the scope of such implied authority.[764]

[756] Osborne, etc., Co. v. Croome, 14 Hun, 164, 77 N. Y. 629.

[757] Blake v. Bayley, 16 Gray, 531; Lockwood v. Mechanics, etc., Bank, 9 R. I. 308.

[758] Blake v. Bayley, 16 Gray, 531.

[759] Briggs v. Spaulding, 141 U. S. 132, 154.

[760] Briggs v. Spaulding, 141 U. S. 132; International Bank v. Faber, 86 Fed. Rep. 443.

[761] At common law the rule was otherwise. Wight v. Springfield, etc., R. Co., 117 Mass. 226; Re St. Lawrence Steamboat Co., 44 N. J. L. 529, 541.

[762] 2 Cook on Corp., 5th ed., § 709.

[763] Eastern R. Co. v. Boston & Maine R. R., 111 Mass. 125, 130. Cf. Charles River Bridge v. Warren Bridge, 7 Pick. 344; Middlesex Husbandmen v. Davis, 3 Met. 133; Bangor, etc., R. Co. v. Smith, 47 Me. 34.

[764] Lester v. Webb, 1 Allen, 34; Narragansett Bank v. Atlantic Silk Co., 3 Met. 282, 289. See Merchants' Bank v. Citizens' Gas Light Co., 159 Mass. 505.

Where corporate records are not produced, but a witness testifies that he has seen them and that it appears therein that a certain person was chosen treasurer, the jury may infer that he was duly elected treasurer and had authority to accept a bill of exchange.[765] And the original minutes of the meeting of a board of trustees kept by one of them who has since died, are competent evidence of the authority of the treasurer to do acts mentioned in the vote of the trustees.[766]

Query, how far the directors can by vote provide that some one else than the treasurer shall sign cheques, except in an emergency, and whether such a provision can be made even by by-law. The statute provides that the treasurer is to be elected by the stockholders, which perhaps implies that they have the right to select the person who is to perform all the duties usually appertaining to the office of treasurer.

Powers he has.

The fact that certain powers are specifically conferred upon the treasurer in the by-laws does not imply that all other powers are negatived or withheld; on the contrary, the treasurer has the usual powers of his office in addition to those specifically given.[767]

"The treasurer of a manufacturing and trading corporation is clothed by virtue of his office with power to act for the corporation, in making, accepting, endorsing, issuing and negotiating promissory notes and bills of exchange." [768]

[765] Narragansett Bank v. Atlantic Silk Co., 3 Met. 282.

[766] Hayward v. Pilgrim Society, 21 Pick. 270.

[767] Fay v. Noble, 12 Cush. 1, 18.

[768] Merchants' Bank v. Citizens' Gas Light Co., 159 Mass. 505, 507, per Barker, J., citing Narragansett Bank v. Atlantic Silk Co., 3 Met. 282; Bates v. Keith Iron Co., 7 Met. 224; Fay v. Noble, 12 Cush. 1; Lester v. Webb, 1 Allen, 34; Lowell Five Cents Savings Bank v. Winchester, 8 Allen, 109; Bird v. Daggett, 97 Mass. 494; Monument National Bank v. Globe Works, 101 Mass. 57; Corcoran v. Snow Cattle Co., 151 Mass. 74.

"There are, however, many corporations which do more or less business to which the rule has been held not to apply. Thus it does not apply to a college: Webber v. Williams College, 23 Pick. 302; nor to a parish: Packard v. First Universalist Society, 10 Met. 427; nor to a monument association: Torrey v. Dustin Monument Association, 5 Allen, 327; nor to a municipality: Lowell Five Cents Savings Bank v. Winchester, 8

The treasurer and general agent of a trading corporation have power together to borrow money, give notes of the corporation therefor and to pledge purchased stock or raw material as security;[769] and, where the treasurer is authorized to give notes of the corporation, he may do so several years after the debt was contracted, the statute of limitations not having run.[770]

A treasurer has also power to collect the debts of the corporation by suit.[771]

Powers he has not.[772]

A treasurer has no authority to compromise claims of the corporation;[773] nor can he promise, in contravention of the by-laws, that a person elected as president of the corporation shall receive a salary.[774]

In general, a treasurer has no authority to endorse notes for the accommodation of third parties;[775] although the holder of

Allen, 109; nor to a savings bank: Tappan v. Warren Five Cents Savings Bank, 127 Mass. 107; nor to a horse railroad company: Craft v. South Boston Railroad, 150 Mass. 207." Merchants' Bank v. Citizens' Gas Light Co., 159 Mass. 505, 508.

[769] Fay v. Noble, 12 Cush. 1, 18.

[770] Hayward v. Pilgrim Society, 21 Pick. 270.

[771] Bristol County Savings Bank v. Keavy, 128 Mass. 298 (suit on note and writ of entry); New England Mutual Life Ins. Co. v. Wing, 191 Mass. 192, 194.

[772] As to the powers of treasurers of *savings banks*, see Holden v. Upton, 134 Mass. 177; Holden v. Phelps, 135 Mass. 61; Commonwealth v. Reading Savings Bank, 137 Mass. 431; Dedham Savings Institution v. Slack, 6 Cush. 408; Bradlee v. Warren Savings Bank, 127 Mass. 107; Commonwealth v. Reading Savings Bank, 133 Mass. 16; Commonwealth v. Scituate Savings Bank, 137 Mass. 301; Holden v. Phelps, 141 Mass. 456; Bristol County Savings Bank v. Keavy, 128 Mass. 298; Greenfield Savings Bank v. Simons, 133 Mass. 415; Jewett v. West Somerville Co-operative Bank, 173 Mass. 54; Slattery v. North End Savings Bank, 175 Mass. 380; Franklin Savings Bank v. Cochrane, 182 Mass. 586.

[773] E. Carver Co. v. Manufacturers Ins. Co., 6 Gray, 214; Craig Silver Co. v. Smith, 163 Mass. 262. Cf. Dedham Inst. Savings v. Slack, 6 Cush. 408.

[774] Henry Wood's Sons Co. v. Schaefer, 173 Mass. 443.

[775] Usher v. Raymond Skate Co., 163 Mass. 1. See Monument National Bank v. Globe Works, 101 Mass. 57; Nat. Bank of Commonwealth v. Law, 127 Mass. 72, 75; Davis v. Old Colony R. Co., 131 Mass. 258; Ex parte Estabrook, 2 Lowell, 547, 548. See also supra, § 4, *xc* and *xf*.

such a note in good faith and for value, without knowledge of its nature, may enforce it against the corporation.[776] And where a treasurer has authority to endorse such notes during a period for which the corporation has a mortgage as security for such endorsements, this does not constitute any evidence of authority to do so after the expiration of such period.[777]

Liabilities.

A treasurer is, of course, liable criminally for embezzlement of the corporation's property;[778] but he is not liable civilly to a stockholder for refusing to pay a dividend declared by the directors, even though he has sufficient funds in his hands to pay it.[779] Nor is he liable civilly to one whom, by fraudulent representations, he has induced to refrain from attaching the property of the corporation, whereby other creditors came in ahead of the plaintiff; for the damage is too uncertain.[780]

Where a treasurer sells a bond of a corporation and is unable or refuses to disclose the amount for which he sold it, he is liable in equity for at least the full market value of the bond at the time of the sale;[781] and receivers of the corporation are not concluded by the acceptance by the directors of fictitious entries made by the treasurer.[782] So, if a treasurer wrongfully lends funds of a corporation to a third person, a suit against the third person is not a ratification of the treasurer's acts and does not discharge his liability; nor is he discharged if the corporation compromise its claim against such third person when the latter is insolvent.[783]

It is the duty of a treasurer to keep money of the corporation distinct from other moneys in his possession, and, if he appro-

[776] Monument Nat. Bank v. Globe Works, 101 Mass. 57. See supra, § 4, *zj*.

[777] Usher v. Raymond Skate Co., 163 Mass. 1.

[778] Commonwealth v. Pratt, 137 Mass. 98.

[779] French v. Fuller, 23 Pick. 108.

[780] Bradley v. Fuller, 118 Mass. 239.

[781] Parker v. Nickerson, 137 Mass. 487. Cf. Parker v. Nickerson, 112 Mass. 195.

[782] Parker v. Nickerson, 137 Mass. 487. Cf. Holden v. Metropolitan Nat. Bank, 151 Mass. 112.

[783] Goodyear Dental Vulcanite Co. v. Caduc, 144 Mass. 85.

priates it and makes himself a debtor instead of an agent, he may be sued at once by the corporation.[784]

h. Other officers and agents.

These have the powers and authority given by the by-laws, if any are therein provided, and otherwise are governed by the board of directors or the executive committee.[785]

"It is not within the general scope of the authority of an agent of a corporation to alter, vary or enlarge contracts made by the corporation under its corporate seal." [786]

General manager.

A general manager who conducts negotiations on behalf of the corporation can bind it by his admissions.[787] Where he has power involving a large measure of discretion, as, for example, the giving of promissory notes, he cannot delegate such a power to subordinates.[788]

The extent of the power of a general manager to hire subordinates depends upon all the circumstances of the case.[789]

The general manager of an investment corporation has power to foreclose a mortgage held by it.[790] The general manager of a towing company has power to bind his corporation by a contract which involves the use of more barges than his company then has.[791]

Special committee.

Sometimes the stockholders at a meeting appoint a special committee for some particular purpose. Such a committee is not an executive committee of the directors such as is con-

[784] Marlborough Association v. Peters, 179 Mass. 61.

[785] 3 Clark & Marshall, Corp., §§ 697–706, 731–733. Cf. Bates v. Keith Iron Co., 7 Met. 224. As to apparent authority, see infra, under *l*.

[786] Boynton v. Lynn Gas Light Co., 124 Mass. 197, 204, per Lord, J.

[787] Buffum v. York Manuf. Co., 175 Mass. 471. See infra, under *o*.

[788] Emerson v. Providence Hat Manuf. Co., 12 Mass. 237. Cf. infra, § 19, c, Delegation of Powers of Directors.

[789] See infra, under *i*.

[790] Trustees of Smith Charities v. Connolly, 157 Mass. 272.

[791] Metropolitan Coal Co. v. Boutell, etc., Towing Co., 81 N. E. Rep. 645 (Mass. 1907).

templated in the act,[792] and it is generally ultra vires for the stockholders to try to take the transaction of business out of the hands of the directors, to whom it is committed by the statute.[793]

Such a committee of course differs also from a standing committee provided for in the charter or by-laws, which is governed in its powers by the latter.[794]

i. Appointment of agents.

Where the organization of the corporation is defective there is no corporation, and no agent can be appointed with authority to act for it.[795]

The extent of the authority of officers and agents to appoint subordinates is a question of fact in each case. Thus, whether the general manager of a manufacturing corporation had authority to contract for the services of a factory superintendent was held to depend upon all the circumstances of the case.[796] But a general manager with power to give promissory notes of the corporation cannot, in general, delegate this power;[797] and one authorized to employ and discharge workmen cannot bind the corporation to pay for the treatment of an employee injured by the machinery.[798]

Where a corporation ratifies the results of the employment of an agent, it also thereby ratifies his appointment.[799]

Where the contract of hiring is silent as to the length of the term of service, it is a question of fact upon all the evidence what was the reasonable understanding of the parties.[800]

[792] See infra, § 19.

[793] 3 Clark & Marshall, Corp., § 627, *b*. But see as to municipal corporations, Boston Electric Co. v. Cambridge, 163 Mass. 64; Damon v. Granby, 2 Pick. 345; Simonds v. Heard, 23 Pick. 120; Keyes v. Westford, 17 Pick. 273; Shea v. Milford, 145 Mass. 528.

[794] Hutchins v. Byrnes, 9 Gray, 367, where the trustees of a savings bank were practically its board of directors.

[795] Fay v. Noble, 7 Cush. 188; Ward v. Brigham, 127 Mass. 24.

[796] Dunton v. Derby Desk Co., 186 Mass. 35. See Henderson v. Raymond Syndicate, 183 Mass. 443, 446.

[797] Emerson v. Providence Hat Manuf. Co., 12 Mass. 237.

[798] King v. Forbes Lithograph Manuf. Co., 183 Mass. 301.

[799] Henderson v. Raymond Syndicate, 183 Mass. 443.

[800] Davis v. Ames Manuf. Co., 177 Mass. 54.

j. — Proof of agency.

The authority of agents may be proved not only by the corporate records, but by the acts of the agents and the general course of business of the corporation.[801]

k. — Labor laws.

A requirement that employees shall agree as a condition of employment not to take any action secretly or otherwise, either by themselves or joining with others, with intent to interfere with the continuous running of the corporation's business does not violate the statute forbidding discrimination against persons wishing to join labor unions.[802]

l. Apparent authority of officers and agents.

Where a corporation gives an officer or agent apparent authority to do a certain act, third persons dealing in good faith with such officer or agent, in ignorance of limitations placed upon his authority, are protected, and the corporation is estopped to deny the authority.[803] This principle applies both to limitations secretly placed upon the powers usually apper-

[801] United States Bank v. Dandridge, 12 Wheat. 64; Melledge v. Boston Iron Co., 5 Cush. 158, 175, 179; Narragansett Bank v. Atlantic Silk Co., 3 Met. 282; Topping v. Bickford, 4 Allen, 120; Emerson v. Providence Hat Manuf. Co., 12 Mass. 237; Lester v. Webb, 1 Allen, 34; Sherman v. Fitch, 98 Mass. 59, 64; Trundy v. Farrar, 32 Me. 225; Badger v. Bank of Cumberland, 26 Me. 428; Warren v. Ocean Ins. Co., 16 Me. 439; Ayer v. R. W. Bell Manuf. Co., 147 Mass. 46; Fay v. Noble, 12 Cush. 1.

[802] 2 Op. Atty.-Gen. 54. See St. 1894, c. 508, § 3.

[803] Merchants' Bank v. State Bank, 10 Wall. 604; Case v. Bank, 100 U. S. 446, 454; Merchants' Nat. Bank v. Citizens' Gas Light Co., 159 Mass. 505; McNeil v. Chamber of Commerce, 154 Mass. 277; Com. v. Reading Savings Bank, 137 Mass. 431; Gilson v. Stevens Machine Co., 124 Mass. 546; Wyman v. Hallowell, etc., Bank, 14 Mass. 58; Holden v. Upton, 134 Mass. 177; Salem Bank v. Gloucester Bank, 17 Mass. 1; Fay v. Noble, 12 Cush. 1; American Mining, etc., Co. v. Converse, 175 Mass. 449; Metropolitan Coal Co. v. Boutell, etc., Towing Co., 81 N. E. Rep. 645 (Mass. 1907); Lester v. Webb, 1 Allen, 34; New York, etc., R. Co. v. Schuyler, 34 N. Y. 30; Page v. Fall River, etc., R. Co., 31 Fed. Rep. 257. A clerk in a general passenger agent's office has no apparent authority to agree that the corporation will pay the funeral expenses of an employee. Rice v. New York, etc., R. Co., 81 N. E. Rep. 285 (Mass. 1907).

taining to the office of the officer or agent, and to extensions beyond such usual powers.

Where, however, there is an express authority, it is not to be extended by implication. Thus where a treasurer was authorized to borrow a certain sum for a particular purpose and to give a note therefor, it was held the corporation was not liable to the holder of another note given by him for other money borrowed, although the lender supposed the treasurer was proceeding under his express authority.[804]

m. Ratification of the acts of agents.

By acting on the doings of its agents and taking advantage of the same, a corporation is held to have ratified their acts without any formal vote.[805] And a ratification of a general result brought about by an agent is usually a ratification of the parts of the transaction and of the means used in connection therewith.[806]

A ratification may also be shown by proving that officers who had the power to authorize the act in question knew of it, and adopted it as a valid act of the corporation, although no formal vote is passed by them.[807] But where only the one doing the act knew of it, even though he be the president of the corporation, he cannot be considered the corporation for the

[804] Lowell, etc., Savings Bank v. Winchester, 8 Allen, 109.

[805] United States Bank v. Dandridge, 12 Wheat. 64; Melledge v. Boston Iron Co., 5 Cush. 158, 175, 179; Bank of Columbia v. Patterson, 7 Cranch, 299; Beacon Trust Co. v. Souther, 183 Mass. 413; Murray v. Nelson Lumber Co., 143 Mass. 250; Nims v. Mount Hermon Boys' School, 160 Mass. 177; Williams v. Cheney, 3 Gray, 215; Lester v. Webb, 1 Allen, 34; New England Mutual Life Ins. Co. v. Wing, 191 Mass. 192; Simmons v. Shaw, 172 Mass. 516; New England Ins. Co. v. De Wolf, 8 Pick. 56. Cf. Thayer v. Boston, 19 Pick. 511.

[806] Henderson v. Raymond Syndicate, 183 Mass. 443 (ratification of land sale as ratification of the employment of a broker).

[807] Murray v. Nelson Lumber Co., 143 Mass. 250; Sherman v. Fitch, 98 Mass. 59; Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315; Kelley v. Newburyport Horse Railroad, 141 Mass. 496; Emerson v. Providence Hat Manuf. Co., 12 Mass. 237; Melledge v. Boston Iron Co., 5 Cush. 158; Lester v. Webb, 1 Allen, 34; John Hood Co. v. American Pneumatic Service Co., 191 Mass. 27.

purpose of ratifying his own act, any more than for conferring authority upon himself to do the act in the first instance.[808]

The absence of one director abroad will not prevent a ratification by the others,[809] and to ratify the acts of an agent it is not necessary for the proper officers to know the legal effect of the facts as well as the facts themselves.[810]

n. Liability of officers and agents.

The officers of a corporation stand in a fiduciary relation to it, and cannot be allowed to take advantage of their position to make personal profits. Contracts or purchases with such an object in view can be adopted or repudiated by the corporation, and the latter can recover the profits upon an implied trust.[811]

An officer of a corporation, who commits a crime for the benefit of the corporation, is personally liable,[812] and the same is true, of course, where the wrong is done to the corporation for his own benefit.

But where a statute imposes a penalty on the "owner, agent or superintendent" of a manufacturing establishment, the agent or superintendent and not the corporation is liable, as the former has more actual knowledge of the violation of law.[813]

"An officer, agent, clerk or servant of a corporation which is organized or doing business in this commonwealth, who wilfully uses the name of such corporation, or his own name as such officer, agent, clerk or servant, to obtain money upon the credit of such corporation for his own use or benefit, without authority from such corporation, or who fraudulently lends, invests or appropriates the money or disposes of the property of such corporation, or fraudulently converts it, shall be punished by imprisonment in the state prison for not more than ten years." [814]

"Whoever knowingly makes and publishes or knowingly causes to be made and published any false or wilfully misleading represen-

[808] Bi-Spool Sewing Machine Co. v. Acme Co., 153 Mass. 404, 408. See Metropolitan Coal Co. v. Boutell, etc., Co., 185 Mass. 391, 397.

[809] Sherman v. Fitch, 98 Mass. 59.

[810] Kelley v. Newburyport Horse Railroad, 141 Mass. 496.

[811] See as to this general subject, infra under Directors, § 19, *d*.

[812] Com. v. Moore, 166 Mass. 513; Com. v. Langley, 169 Mass. 89, 95.

[813] Benson v. Monson, etc., Manuf. Co., 9 Met. 562. Otherwise, where the statute expressly mentions corporations. Commonwealth v. Osborn Mill, 130 Mass. 33.

[814] R. L., c. 208, § 62; Pub. St., c. 203, § 62; St. 1878, c. 274.

tation or advertisement in the form of a book, paper, prospectus, notice or other publication of or concerning any merchandise or commodity offered for sale by any . . . corporation shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than two years, or by both such fine and imprisonment."[815]

o. Admissions and representations by officers and agents.[816]

Admissions made by a general manager who has been conducting negotiations on behalf of a corporation are competent as against the corporation,[817] and the same is true of other officers.[818] But, in general, admissions are competent as against the corporation only when made in regard to a pending transaction;[819] or, as it is often said, they must be made in the course of the officer's or agent's duty.[820]

The same principle applies to representations by officers of a corporation, namely, to bind the corporation the representations must be within the scope of their authority.[821] Mere oral

[815] St. 1907, c. 383, in effect June 5, 1907.

[816] As to admissions in corporation records, see infra, § 30, *e*.

[817] Buffum v. York Manuf. Co., 175 Mass. 471 (admissions in letters); Henderson v. Raymond Syndicate, 183 Mass. 443 (ditto).

[818] McGenness v. Adriatic Mills, 116 Mass. 177 (superintendent); Morse v. Connecticut River R. Co., 6 Gray, 450 (conductor, baggagemaster, stationmaster). Cf. Nash v. Minnesota, etc., Trust Co., 159 Mass. 437.

[819] Stiles v. Western R. Co., 8 Met. 44 (agent).

[820] Gilmore v. Mittineague Paper Co., 169 Mass. 471, 476 (treasurer and general manager as to whether a woman could run a certain machine); Richstain v. Washington Mills Co., 157 Mass. 538 (overseer, as to matters of negligence after an accident); Wellington v. Boston & Maine Railroad, 158 Mass. 185 (general manager, as to purpose for which land taken by eminent domain was to be used); Toy v. United States Cartridge Co., 159 Mass. 313 (superintendent, as to nature of flaws in machinery); Boston & Maine Railroad v. Ordway, 140 Mass. 510 (agent, after goods delivered, tending to show liability); Williamson v. Cambridge R. Co., 144 Mass. 148 (conductor, after accident, as to negligence); Leistritz v. American Zylonite Co., 154 Mass. 382 (foreman, after accident, as to negligence of subordinate); Tripp v. New Metallic Packing Co., 137 Mass. 499 (treasurer, that condition precedent had been performed); Massell v. Boston Elevated R. Co., 191 Mass. 491 (motormen and conductors, as to violation of rules).

[821] Nash v. Minnesota, etc., Trust Co., 159 Mass. 437, 444; Holmes v. Turner's Falls Co., 150 Mass. 535; McNeil v. Boston Chamber of Commerce,

representations, however, in reference to the financial standing and means of the corporation if made to induce the giving of credit to the corporation are made with reference to the credit and ability of another person, are within the Statute of Frauds, and no action can be maintained thereon.[822] And officers are not liable except as provided by statute for false statements in corporation reports and returns filed by them.[823]

p. Notice to and knowledge of officers and agents.

Where a director or other officer or an agent of a corporation is acting for the corporation, the latter is affected with his knowledge in regard to the matter in question.[824]

But the rule is otherwise where the business is being transacted with some other officer or agent than the one having the knowledge;[825] or when the one having the knowledge is not really acting for the corporation but is acting for himself in violation of his duty to the corporation.[826]

154 Mass. 277; Commonwealth v. Reading Savings Bank, 137 Mass. 431, 437, 438; Commonwealth v. Reading Savings Bank, 133 Mass. 16.

[822] R. L., c. 74, § 4; Hunnewell v. Duxbury, 157 Mass. 1, 6. Cf. Walker v. Russell, 186 Mass. 69, 72. See also supra, chap. IV, A, 3.

[823] See infra, §§ 34, *e*, 60, *c*.

For St. 1907, c. 383, as to representations concerning merchandise, see supra, under *n*.

[824] National Security Bank v. Cushman, 121 Mass. 490; Washington Bank v. Lewis, 22 Pick. 24; Clarke v. Second National Bank, 177 Mass. 257, 267. Cf. as to individual principals, Suit v. Woodhall, 113 Mass. 391; Sartwell v. North, 144 Mass. 188. See also Loring v. Brodie, 134 Mass. 453, 468.

[825] National Security Bank v. Cushman, 121 Mass. 490, citing Washington Bank v. Lewis, 22 Pick. 24; Commercial Bank v. Cunningham, 24 Pick. 270; Housatonic Bank v. Martin, 1 Met. 294; West Boston Savings Bank v. Thompson, 124 Mass. 506, 514; Indian Head National Bank v. Clark, 166 Mass. 27, 30; Corcoran v. Snow Cattle Co., 151 Mass. 74; National Bank of Grafton v. Babbidge, 160 Mass. 563.

[826] Allen v. South Boston R. Co., 150 Mass. 200, 206; Innerarity v. Merchants' National Bank, 139 Mass. 332; Craft v. South Boston R. Co., 150 Mass. 207; Atlantic National Bank v. Harris, 118 Mass. 147; Indian Head National Bank v. Clark, 166 Mass. 27; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 279.

Cf. as to individual principals, Dillaway v. Butler, 135 Mass. 479; Howe v. Newmarch, 12 Allen, 49.

In the latter case, the reason of the rule is said to be that there is a presumption that the agent will not communicate his knowledge;[827] or, that, as the independent fraud is beyond the scope of the officer's employment, knowledge of the fraud cannot be imputed.[828]

In accordance with this principle, where it is the duty of one agent to inform the corporation about the accounts of another, it is not chargeable as against the former with knowledge of the very facts of which it was his duty to inform it.[829]

Where the guarantors on the bond of a corporation are directors of the corporation, they are presumed to know of the latter's default, and no formal notice of such default need be given them.[830]

q. Liability of corporation for torts of officers and agents.

In general, a corporation is liable for the torts of its officers and agents within the scope or the apparent scope of their authority; but not for other torts, unless it has ratified them.[831]

"It is a general rule that corporations are liable for their torts as natural persons are. It is no defence to an action for a tort to show that the corporation is not authorized by its charter to do wrong."[832]

Therefore a corporation may be liable for personal injuries caused by the negligence of its officers and agents in managing

See also Atlantic Bank v. Merchants' Bank, 10 Gray, 532; Ingraham v. Maine Bank, 13 Mass. 208; Clark v. Second National Bank, 177 Mass. 257.

[827] Innerarity v. Merchants' National Bank, 139 Mass. 332, 333, per Devens, J.

[828] Allen v. South Boston R. Co., 150 Mass. 200, 206, per Field, J.

[829] Commonwealth v. Mulrey, 170 Mass. 103.

[830] Graham v. Middleby, 185 Mass. 349.

[831] 1 Clark & Marshall, Corp., § 236; 3 ibid, § 734; Philadelphia, etc., R. Co. v. Quigley, 21 How. 202; Denver, etc., R. Co. v. Harris, 122 U. S. 597; New York, etc., R. Co. v. Haring, 47 N. J. L. 137; Fishkill Savings Institution v. National Bank, 80 N. Y. 162; Foster v. Essex Bank, 17 Mass. 479.

[832] Nims v. Mount Hermon Boys' School, 160 Mass. 177, 178, per Knowlton, J. See Monument Nat. Bank v. Globe Works, 101 Mass. 59.

its property;[833] for assault and battery;[834] for false imprisonment;[835] for malicious prosecution;[836] for false and fraudulent representations;[837] for a libel;[838] or for contempt of court;[839] in trespass for injury to property.[840]

In some cases the officer or agent may be liable as well as the corporation.[841]

Acts causing death.

"If a person or corporation by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars to be assessed with reference to the degree of his or its culpability or of that of his or its agents or servants, to be recovered in an action of tort, commenced within two years after the injury which caused the death, by the executor or administrator of the deceased, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin." [842]

[833] Nims v. Mount Hermon Boys' School, 160 Mass. 177; Bryant v. Bigelow Carpet Co., 131 Mass. 491; Rowe v. Granite Bridge, 21 Pick. 344; Estabrooks v. Peterborough, etc., R. Co., 12 Cush. 224; Perry v. Worcester, 6 Gray, 544; Sprague v. Worcester, 13 Gray, 193.

[834] Moore v. Fitchburg R. Co., 4 Gray, 465; Ramsden v. Boston & Albany R. Co., 104 Mass. 117; Hewett v. Swift, 3 Allen, 420; Holmes v. Wakefield, 12 Allen, 580; Barrett v. Malden, etc., R. Co., 3 Allen, 101.

[835] Frost v. Domestic Sewing Machine Co., 133 Mass. 563.

[836] Reed v. Home Savings Bank, 130 Mass. 443.

[837] Fogg v. Griffin, 2 Allen, 1.

[838] Fogg v. Boston & Lowell R. Co., 148 Mass. 513; Howland v. Blake Manuf. Co., 156 Mass. 543; Comerford v. West End Street Railway, 164 Mass. 13; Hartnett v. Plumbers' Supply Association, 169 Mass. 229, 236; Brown v. Mass. Title Ins. Co., 151 Mass. 127.

Cf. as to associations, Hartnett v. Goddard, 176 Mass. 326; Weston v. Barnicoat, 175 Mass. 454.

[839] Telegram Newspaper Co. v. Commonwealth, 172 Mass. 295.

[840] Riddle v. Proprietors, 7 Mass. 169.

[841] Holmes v. Wakefield, 12 Allen, 580; Moore v. Fitchburg R. Co., 4 Gray, 465; Hewett v. Swift, 3 Allen, 420.

[842] St. 1907, c. 375, § 1; R. L., c. 171, § 2; St. 1898, c. 565; St. 1897, c. 416.

Citations. — Manning v. Conway, 192 Mass. 123, 125; Pearlstein v. New York, etc., R. Co., 192 Mass. 27; Oulighan v. Butler, 189 Mass. 287; Brennan v. Standard Oil Co., 187 Mass. 376; Hudson v. Lynn & Boston R. Co.,

Under this section, if injury is caused by a defect, the defect need not be the sole cause of the injury, as under the highway acts.[843]

In an action under this section, the declaration must allege that the decedent left a widow, or children, or next of kin. If it does not, the defect may be taken advantage of by demurer;[844] or, as it is a defect of substance, by a request for a ruling that the plaintiff is not entitled to recover on the pleading.[845] It cannot be raised only on an argument on an exception to a refusal to give a general ruling at the end of the trial, that upon all the evidence the plaintiff is not entitled to recover.[846]

A count for death, under this section, cannot be joined with a count at common law for conscious suffering before death.[847]

§ 18. Election of officers.

"The directors, the treasurer, the clerk and such other officers as the by-laws may prescribe shall be elected annually by the stockholders by ballot, and the president shall be elected annually by and from the board of directors. Every director, unless the by-laws otherwise provide, shall be a stockholder. The treasurer may be required to give a bond for the faithful performance of his duty in such sum and with such sureties as the by-laws may prescribe. The clerk, who shall be a resident of this commonwealth, shall be sworn and shall record all votes of the corporation in a book to be kept for that purpose. Every corporation may, by its articles of organization or by an amendment to such articles adopted as hereinafter provided, divide its directors into classes

185 Mass. 510; Hayes v. Pitts-Kimball Co., 183 Mass. 262; Kelsey v. New York, etc., R. Co., 181 Mass. 64; Worcester, etc., R. Co. v. Travellers' Ins. Co., 180 Mass. 263; Higgins v. Central New England, etc., R. Co., 155 Mass. 176; Bancroft v. Boston, etc., R. Co., 11 Allen, 34.

For the history of the matter, see Hudson v. Lynn & Boston R. Co., 185 Mass. 510.

[843] Oulighan v. Butler, 189 Mass. 287, 292.

[844] Oulighan v. Butler, 189 Mass. 287; Commonwealth v. Boston & Albany R. Co., 121 Mass. 36.

[845] Oulighan v. Butler, 189 Mass. 287; Commonwealth v. Eastern R. Co., 5 Gray, 473.

[846] Oulighan v. Butler, 189 Mass. 287.

[847] Brennan v. Standard Oil Co., 187 Mass. 376.

and prescribe the tenure of office of the several classes; but no class shall be elected for a shorter period than one year or for a longer period than five years, and the term of office of at least one class shall expire in each year. Except as herein otherwise provided, the officers of a corporation shall hold office for one year and until their successors are chosen and qualified. The manner of choosing or of appointing all other agents and officers and of filling all vacancies shall be prescribed by the by-laws, and, in default of such by-law, vacancies may be filled by the board of directors." [848]

a. Scope of this section.

The provision for the election of officers obviously does not apply to the original meeting of the subscribers for organization.[849] It is also directory.[850] Therefore, an omission to elect a clerk at an annual meeting of a corporation which elected one during the year before, who continued to hold over, does not work a dissolution of the corporation, for if it did there would be no need of a clerk and no corporation to select one.

[848] This section differs from the previous law chiefly in providing for classes of directors and in requiring the clerk to be a resident of the commonwealth.

St. 1903, c. 437, § 18; R. L., c. 110, §§ 22–24; Pub. St., c. 106, §§ 23, 24, 25, 26; St. 1870, c. 224, §§ 15, 16, 17, 18; Gen. St., c. 60, §§ 3, 4, 5, 6; Rev. St., c. 38, §§ 2, 3, 4, 5; St. 1829, c. 53, § 1; St. 1808, c. 65, § 1; St. 1866, c. 290, § 3; St. 1874, c. 349, § 1.

Citations. — Pub. St., c. 106, §§ 23, 24, 25, 26: American Tube Works v. Boston Machine Co., 139 Mass. 10, 29 N. E. Rep. 63; Saltmarsh v. Spaulding, 147 Mass. 227, 17 N. E. Rep. 316; Dunphy v. Traveller Newspaper Association, 146 Mass. 498, 16 N. E. Rep. 426; Evans v. Boston Heating Co., 157 Mass. 38, 31 N. E. Rep. 698; Citizens' Gas Light Co. v. Wakefield, 161 Mass. 438, 37 N. E. Rep. 444; Marlborough Ass'n v. Peters, 179 Mass. 61, 60 N. E. Rep. 396.

St. 1870, c. 224, §§ 15, 16, 17, 18: American Tube Works v. Boston Machine Co., 139 Mass. 10, 29 N. E. Rep. 63; Evans v. Boston Heating Co., 157 Mass. 40, 31 N. E. Rep. 698.

Rev. St., c. 38, §§ 2, 3, 4, 5: Whittenton Mills v. Upton, 10 Gray, 595; Boston Acid Mfg. Co. v. Moring, 15 Gray, 211; Dunphy v. Traveller Newspaper Association, 146 Mass. 498, 16 N. E. Rep. 426; Narragansett Bank v. Atlantic Silk Co., 3 Met. 287; Knowlton v. Ackley, 8 Cush. 94; Chelmsford Co. v. Demorest, 7 Gray, 3; Middlesex Mfg. Co. v. Lawrence, 1 Allen, 341.

[849] Boston Acid Mfg. Co. v. Moring, 15 Gray, 211.

[850] Knowlton v. Ackley, 8 Cush. 94.

The statute prescribes the duty of the corporation, but also provides for its neglect or omission to choose new officers, whether from failure to elect, omission to qualify, or other cause.[851]

b. Manner of election.

Inasmuch as the election of officers is by the statute entrusted to the stockholders, it is not permissible for the corporation to provide in its by-laws that this power shall be delegated to the directors.[852] But, although the statute requires the directors to be stockholders and the president to be a director, it seems that one not a stockholder may preside over a meeting of the corporation.[853]

If the by-laws require a majority of the stock to be represented at a meeting, an election of directors by a minority of the stock is void, and the persons elected are not even officers *de facto,* but the old officers hold over.[854] So, where the notice of a meeting states that it is to be held for the purpose of altering the by-laws and the transaction of such other business as may come before the stockholders, and there is no by-law prescribing the number of directors, such meeting cannot increase the number of directors, alter the quorum of the board and elect the additional members of it; and an assessment levied by the directors at a meeting where only the new members are present is void.[855]

In the absence of evidence to the contrary, it will be presumed that officers were chosen in the prescribed manner;[856] and the fact that certain persons voted who should not have been al-

[851] Ibid. Cf. Machias Hotel Co. v. Fisher, 56 Me. 321; South Bay Meadow Dam Co. v. Gray, 30 Me. 547; Penobscot, etc., R. Co. v. Dunn, 39 Me. 587.

[852] 2 Op. Atty.-Gen. 230.

[853] Stebbins v. Merritt, 10 Cush. 27.

[854] Ellsworth Co. v. Faunce, 79 Me. 440. This principle is criticized in Castner v. Twitchell-Champlin Co., 91 Me. 524.

[855] People's Mutual Ins. Co. v. Westcott, 14 Gray, 440. In the same case, *quære* whether the action of the annual meeting in electing a certain number of directors does not fix it for the ensuing year, so that no change can be made until the succeeding annual meeting.

[856] Blanchard v. Dow, 32 Me. 557. Cf. infra, § 20, *f.*

lowed to, will not render an election illegal unless their votes changed the result.[857]

Officers should be voted for in the regular way, and it is not proper to vote to authorize the clerk to cast one ballot, for this tends to destroy the secrecy of the ballot and the freedom of choice.[858]

c. Term of office.

Electing an officer is not a contract with him for a stated time, and implies no agreement on the part of the corporation to carry on its business for the whole of his term of office.[859] Therefore, where a corporation sells all its property within the year for which an officer is chosen, the latter has no action for his full salary, but only for the difference between his salary and what he could have earned in some other occupation, and such loss must be proved.[860]

d. — Removal of officers.

Where the term of office is fixed by statute, as under the present act, neither the stockholders nor the directors can remove a director or other officer except for cause.[861]

e. — Officers holding over.

The provision that officers of corporations shall hold over until their successors are chosen and qualified does not prevent the termination of their holding office by mutual agreement before a permanent successor is chosen.[862]

[857] School District v. Gibbs, 2 Cush. 39, 45; First Parish in Sudbury v. Stearns, 21 Pick. 148; Wardens of Christ Church v. Pope, 8 Gray, 140, 146.

[858] See letter of Judge W. T. Forbes in Worcester Spy, Dec. 30, 1902.

[859] Bussell Trimmer Co. v. Coburn, 188 Mass. 254.

[860] Bussell Trimmer Co. v. Coburn, 188 Mass. 254. As to salaries, see supra, § 17, *d*, *e*.

[861] 3 Clark & Marshall, Corp., § 666.

Under the New Jersey St. 1896, c. 185, § 13, there is no provision for an annual election, and it was held that officers could be removed. Re Griffing Iron Co., 63 N. J. L. 168.

[862] Marlborough Association v. Peters, 179 Mass. 61, 60 N. E. Rep. 396; Briggs v. Spaulding, 141 U. S. 132.

On the other hand, an officer who is once duly qualified and is re-elected, holds under his first election until he is qualified under the second election, so that, if there be any informality or defect in qualifying the second time, his acts are nevertheless valid.[863]

"The law having directed that such officer shall be chosen annually, or at the annual meeting, it assumes and presupposes that such direction will be complied with, and then the words in question ['until others are chosen and qualified'] must be construed to mean, till the next annual meeting, or meeting at which such annual election is to be made, and such reasonable time afterwards as shall be sufficient to enable the officer elect to procure and deliver his bond, and do whatever else is required to complete his qualification; or, if he fails thus to qualify, until the corporation can elect another and cause him to be qualified." [864]

f. Qualifications of officers.

As to this matter, see supra, § 17, b, f.

g. Bonds of officers.

Bonds are frequently required of the treasurer and assistant treasurer of corporations, and sometimes of other officers. They run in each instance to the corporation.

Execution and delivery.

The official bond should of course be under seal. The signatures upon it need not be witnessed,[865] but the bond should be properly delivered to the corporation.[866]

Each surety should be bound in the full penal sum of the

[863] Hasting v. Blue Hill Turnpike Corporation, 9 Pick. 80.

[864] Chelmsford Co. v. Demarest, 7 Gray, 1, 4, per Shaw, C. J.

[865] Adams v. Frye, 3 Met. 103, 105. The fraudulent addition of a witness's name may invalidate a bond. Ibid.

[866] Fay v. Richardson, 7 Pick. 91; Thomas v. Bleakie, 136 Mass. 568, 572. See Johnson v. Gerald, 169 Mass. 500, where the principal obligor was found to have delivered the bond to himself as an officer of the corporation.

bond,[867] but if the sureties bind themselves each for a portion of the penalty, the plaintiff may sue them all and recover against each.[868]

Bonds executed by partnerships should, on general principles be executed in the firm name by both partners, but evidence of express authority or ratification by the partners not signing will bind all.[869]

h. — Statutory provisions.

Where there are any provisions of statute governing the matter of bonds, as may be the case with corporations organized under a special charter, such bonds may be valid even though the statute provisions are not followed. "The rule of law is well settled, that a bond given for the faithful performance of official duties, or in pursuance of some requirement of law, may be valid and binding on the parties although not made with the formalities or executed in the mode provided by the statute under which it purports to have been given. This rule rests on the principle that, although the instrument may not conform to the special provisions of a statute or regulation in compliance with which the parties executed it, nevertheless it is a contract voluntarily entered into upon a sufficient consideration, for a purpose not contrary to law, and therefore it is obligatory on the parties to it in like manner as any other contract or agreement is held valid at common law." [870]

i. — Sureties.[871]

A director of a corporation may be a surety on the bond of an officer, unless there is something in the by-laws to prevent.[872]

[867] Bank of Brighton v. Smith, 5 Allen, 413.

[868] Ibid.

[869] Ahrend v. Odiorne, 125 Mass. 50 (holding that a default by partners who are principals binds the surety); Russell v. Annable, 109 Mass. 72.

[870] Bank of Brighton v. Smith, 5 Allen, 413, 415, per Bigelow, C. J.; Grocers' Bank v. Kingman, 16 Gray, 473; Farr v. Rouillard, 172 Mass. 303; Sweetser v. Hay, 2 Gray, 49.

[871] As to release of sureties, see infra, under *k*.

[872] Amherst Bank v. Root, 2 Met. 522, 535.

Where directors of a corporation are sureties on its bond to another, they are presumed to know its financial condition, and no notice of its default need be given them by the obligee.[873] The same principle would doubtless be applied to directors who were sureties on the bond of an officer.

j. — Acceptance and approval of bonds.

It is usual and proper for the directors to pass a vote approving official bonds, and by-laws frequently provide therefor. The acceptance or approval of a bond may, however, be presumed from circumstances without a formal vote.[874] Indeed, provisions of the by-laws requiring the approval of directors are held to be directory, and if a bond is properly executed and delivered it becomes binding upon the principal and sureties.[875]

k. — Duration of liability.

"Where the tenure of the office is for a year or any fixed period of time, the sureties upon the bond given for the faithful performance by the incumbent of the duties of the office, are not liable for any defaults of the principal occurring under a new appointment after the year or other fixed period has expired, unless the bond contains stipulations that the sureties shall be liable during any successive terms of office to which the principal may be elected or appointed. This is upon the ground that, by virtue of his re-election, the principal enters upon a new office, which is not contemplated or provided for

[873] Graham v. Middleby, 185 Mass. 349, 356.

[874] Amherst Bank v. Root, 2 Met. 522, 534 (where a cashier's bond was presented to directors at a meeting, who expressed themselves as satisfied with it); Dedham Bank v. Chickering, 3 Pick. 335 (where the charter required the approval of two sureties by the directors, the latter approved two sureties to be given, and the bond was later found in the possession of the president); Lexington, etc., R. Co. v. Elwell, 8 Allen, 371, 379 (where the bond was submitted to the directors and delivered to the president) Bank of United States v. Dandridge, 12 Wheat. 64; Johnson v. Gerald, 169 Mass. 500.

[875] Amherst Bank v. Root, 2 Met. 522, 533; Johnson v. Gerald, 169 Mass. 500, 503.

in the bond." [876] This is true whether the term is specified in the bond or is fixed by law or usage.[877]

"On the other hand, if the office is for an indefinite and not a fixed period of time, the sureties on a bond given for the faithful performance of the duties of the office, which does not contain any stipulations covering the period for which they shall be liable, are liable so long as the principal shall continuously hold the office." [878] But if the service is interrupted, and another officer is elected meanwhile, the bond does not cover a second term of office.[879]

Where a bond is for the term of office, and, as in the case of the present act, the officer is to hold office until another is chosen and qualified in his stead, the bond is binding for a reasonable time after the election to allow the officer elect to accept and to procure a new bond.[880] But even a bond covering "for such further periods as he may from time to time be elected to said office," does not cover defaults occurring after an omission to re-elect at a regular meeting for that purpose and after such further time as may be reasonably sufficient for the election and qualification of his successor, though he continues to act as treasurer and is re-elected at the next regular meeting.[881]

[876] Richardson School Fund v. Dean, 130 Mass. 242, 244, per Morton, J.; Bigelow v. Bridge, 8 Mass. 275; Chelmsford Co. v. Demarest, 7 Gray, 1; Middlesex Manuf. Co. v. Lawrence, 1 Allen, 339; Lexington, etc., R. Co. v. Elwell, 8 Allen, 371; O'Brien v. Murphy, 175 Mass. 253.

See Thomas v. Bleakie, 136 Mass. 568; Badlam v. Tucker, 1 Pick. 284, 287, where an officer resigns and his resignation is accepted, but he continues to serve the corporation, the old bond does not cover the new service. Amicable, etc., Ins. Co. v. Sedgwick, 110 Mass. 163.

[877] O'Brien v. Murphy, 175 Mass. 253.

[878] Richardson School Fund v. Dean, 130 Mass. 242, 244, per Morton, J.; Amherst Bank v. Root, 2 Met. 522; Worcester Bank v. Reed, 9 Mass. 267; Dedham Bank v. Chickering, 3 Pick. 335; Cambridge v. Fifield, 126 Mass. 428; Com. v. Reading Savings Bank, 129 Mass. 73; Singer Manuf. Co. v. Reynolds, 168 Mass. 588.

[879] Middlesex Manuf. Co. v. Laurence, 1 Allen, 341. A mere revision of statutes or ordinances does not, however, affect the service. Cambridge v. Fifield, 126 Mass. 428.

[880] Chelmsford Co. v. Demarest, 7 Gray, 1, 4; Lexington, etc., R. Co. v. Elwell, 8 Allen, 371 (where the annual election was postponed five weeks, and the bond was held to cover that period). O'Brien v. Murphy, 175 Mass. 253, 256.

[881] Lexington, etc., R. Co. v. Elwell, 8 Allen, 371.

Any material change in the responsibilities or compensation of the officer, made without the assent of the sureties, may operate to discharge them.[882] Thus, an increase in the capital stock of the corporation, involving as it does an increase in the liabilities of the officers, discharges the sureties; hence new bonds should be required.[883]

But a mere change in the method of compensation will not affect the liability of the sureties unless mentioned in the bond;[884] and, where a bond expressly contemplates an increase of duties in the future, such increase will not discharge the sureties.[885] Nor, where there is no fraud on the part of directors in inducing persons to execute a bond, will they be discharged as sureties by any negligence of the directors in failing to examine the books and affairs of the corporation.[886] Nor will the failure to cause the by-laws of the corporation to be observed, although the bond refers to them, release the sureties.[887]

l. — Breach by officer.

An official bond "binds the obligors to a responsibility for reasonable and competent skill and due and ordinary diligence in the performance of his office . . . what is reasonable and competent skill and due and ordinary diligence depends upon the nature of the office."[888]

In one case, the condition of a bond of a treasurer of a corporation was that he "shall faithfully discharge his said trust as treasurer, and shall take good care of the corporate funds

[882] Amicable, etc., Ins. Co. v. Sedgwick, 110 Mass. 163; Boston Hat Manufactory v. Messinger, 2 Pick. 223; Rollstone National Bank v. Carleton, 136 Mass. 226; Germania Fire Ins. Co. v. Lange, 193 Mass. 67.

[883] Grocers' Bank v. Kingman, 16 Gray, 471, 477.

[884] Amicable, etc., Ins. Co. v. Sedgwick, 110 Mass. 163. Aliter, where a change in the method of compensation involves a change in liability. Germania Fire Ins. Co. v. Lange, 193 Mass. 67.

[885] Eastern R. Co. v. Loring, 138 Mass. 381.

[886] Tapley v. Martin, 116 Mass. 275 (where an officer had committed frauds before the bond was given); Amherst Bank v. Root, 2 Met. 522; Farmington v. Stanley, 60 Me. 472; United States v. Kirkpatrick, 9 Wheat. 720.

[887] Watertown Ins. Co. v. Simmons, 131 Mass. 85.

[888] American Bank v. Adams, 12 Pick. 303, 306, per cur.

which may come to his hands, and shall make good to the corporation any losses therein which may accrue by reason of any gross neglect or misfeasance of his, during his official service; and shall faithfully fulfil his duties as treasurer, according to the constitution and by-laws." The by-laws provided that the treasurer should take charge of the funds, collect fees, pay bills and invest funds as approved by the directors, and keep accounts. It was held that a refusal to assist a collector authorized by the directors, the allowing pages to be torn out of record books, exposing corporate property to attachment, and seeking a dissolution of the corporation, were not breaches of the bond.[889]

m. — Action on bond.

Even where a bond is required, the giving of it is not a condition precedent to the existence of the corporation or to its right to maintain an action.[890]

It is not necessary to wait for the ending of an officer's term in order to sue on his bond, but the corporation may maintain an action at once upon breach.[891]

Provisions in bonds limiting the period within which actions can be brought for breaches thereof are valid;[892] but, in one case, where an action had been begun within the stipulated period, and the surety died, it was held that a new action could be brought against the surety's administrator, after the stipulated period, on the ground of "an implied condition of the continued existence of the life of the contractor."[893]

n. — Measure of damages.

Whether the sum named in the bond is to be considered as a penalty or as liquidated damages depends upon the intention of the parties.[894]

[889] The Literati v. Heald, 141 Mass. 326.

[890] Boston Acid Manuf. Co. v. Moring, 15 Gray, 211.

[891] Marlborough Association v. Peters, 179 Mass. 61 (defaulting treasurer).

[892] Eliot National Bank v. Beal, 141 Mass. 566.

[893] Eliot National Bank v. Beal, 141 Mass. 566.

[894] 1 Sutherland on Damages, 3d ed., §§ 283, 293; 2 Joyce on Damages, §§ 1297, *ff*, 1302; Chase v. Allen, 13 Gray, 42; Lynde v. Thompson, 2 Allen,

Even though the bond does not mention interest as a part of the contract, interest on the penal sum may be allowed. It is the duty of the surety to pay after default of the principal on demand; and, if he neglects to do so, interest may be added as damages for his own default.[895]

Where a bond was for a certain sum and "ten per cent. attorney's fees," it was held the latter was a separate penalty.[896]

o. Oath of clerk.

The statute requires the clerk to be sworn, but this provision is directory merely, and his omission to take the oath does not invalidate the corporate records, provided he swears to their correctness in the action in which they are used as evidence.[897] Similarly the corporation cannot take any advantage of the omission of its clerk to be sworn.[898]

p. Filling vacancies.

The wording of this provision is substantially the same as in the New Jersey statute, under which it has been held that an increase in the number of directors does not make the new offices "vacancies," so that they can be filled by the other directors, but that such new positions must be filled through election by the stockholders.[899]

q. Certificate of changes in officers.

"Whenever any change is made in the officers of a domestic corporation the corporation shall forthwith file in the office of the commissioner of corporations a certificate of such change, signed and sworn to by the president, clerk and a majority of its directors." [900]

456, 459; Hall v. Crowley, 5 Allen, 304; Fiske v. Gray, 11 Allen, 132; Smith v. Brown, 164 Mass. 584; Leary v. Laflin, 101 Mass. 334; Hodges v. Allen, 7 Met. 583; Garcin v. Pennsylvania Furnace Co., 186 Mass. 405.

[895] Bank of Brighton v. Smith, 12 Allen, 243, 252; White v. French, 15 Gray, 339, 342.

[896] Singer Manuf. Co. v. Reynolds, 168 Mass. 588. Query as to the validity of such a provision.

[897] Stebbins v. Merritt, 10 Cush. 27, 31.

[898] Hastings v. Blue Hill Turnpike Corp., 9 Pick. 80.

[899] Re A. A. Griffing Iron Co., 63 N. J. L. 168.

[900] St. 1907, c. 282, § 1.

"Any such corporation which omits to make and file a certificate as aforesaid within thirty days after such a change has been made, or which fails to keep a clerk of the corporation in this commonwealth, shall forfeit not more than five hundred dollars, to be recovered in the manner prescribed by section fifty of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three." [901]

"Every officer of such a corporation who fails to perform any duty imposed upon him by this act shall be liable to a fine of not more than five hundred dollars." [902]

r. Remedy against those improperly holding office.

In general, as between rival claimants to an office, the usual remedy is *mandamus* by the corporation to compel the surrender to its lawful officers of books and papers in the possession of persons who have usurped offices under claim of right.[903] *Quo warranto* will also lie,[904] but relief cannot be had in a bill in equity, even though equity has taken jurisdiction on other grounds.[905]

§ 19. Powers of directors and of executive committee.[906]

"The board of directors may exercise all of the powers of the corporation, except such as are conferred by law, or by the by-laws of the corporation, upon the stockholders. A corporation may, by its by-laws, provide for an executive committee to be elected from and by its board of directors. To such committee may be delegated the management of the current and ordinary business of the corporation, and such other duties as the by-laws may prescribe." [907]

[901] St. 1907, c. 282, § 2.

[902] St. 1907, c. 282, § 3, in effect May 6, 1907.

[903] American Railway Frog Co. v. Haven, 101 Mass. 398; St. Luke's Church v. Slack, 7 Cush. 226; New England Life Ins. Co. v. Phillips, 141 Mass. 535, 546; Conlin v. Aldrich, 98 Mass. 557. Cf. Re Long Island R. Co., 19 Wend. 37; Re St. Lawrence Steamboat Co., 44 N. J. L. 529, 535.

[904] American Railway Frog Co. v. Haven, 101 Mass. 398; New England Life Ins. Co. v. Phillips, 141 Mass. 535, 546.

[905] New England Life Ins. Co. v. Phillips, 141 Mass. 535.

[906] As to certain matters common to directors and other officers and agents of corporations, see also supra, § 17.

As to the manner in which directors must act, quorum of the board, etc., see infra, § 25.

[907] St. 1903, c. 437, § 19. This section is substantially new. Cf. § 17 of this Act and R. L., c. 110, § 22.

a. General powers of directors.

In pursuance of their general power to conduct the corporation's business, and in the absence of special restrictions, directors may borrow money and give security therefore;[908] transfer and convey property in payment of a debt of the corporation or in the usual course of business;[909] make an assignment for the benefit of creditors;[910] submit to an arbitration.[911]

They may also call special meetings of the stockholders, even though the by-laws may provide that certain officers shall call a meeting on the application of a certain number of stockholders.[912]

They may appoint agents,[913] and may fix the amount of the salaries of officers and agents, unless restrained by by-law or vote of the stockholders.[914] They may authorize an agent to raise money for his own use on the credit of the corporation.[915]

b. Limitation of powers.

This section refers only to the ordinary course of business of the corporation, although in terms it says the board may exercise "all" the powers, etc.[916] Thus, they cannot ordinarily sell out all the property of the corporation,[917] or any portion essential to its business;[918] and, although it is frequently done, they have no power to make gifts of the corporation's money.[919]

[908] Burrill v. Nahant Bank, 2 Met. 163; Saltmarsh v. Spaulding, 147 Mass. 224; Hayward v. Pilgrim Society, 21 Pick. 270; Hendee v. Pinkerton, 14 Allen, 381.

[909] Sargent v. Webster, 13 Met. 497; Burrill v. Nahant Bank, 2 Met. 163; Northampton Bank v. Pepoon, 11 Mass. 288.

[910] Sargent v. Webster, 13 Met. 497.

[911] Morville v. American Tract Society, 123 Mass. 129.

[912] Citizens Mutual Fire Ins. Co. v. Sortwell, 8 Allen, 217, 222.

[913] Pierce v. Morse-Oliver Co., 94 Me. 406. The agents may be of their number. Ibid.

[914] Fillebrown v. Hayward, 190 Mass. 472; Von Arnim v. American Tube Works, 188 Mass. 515. Cf. Tripp v. Swanzey Paper Co., 13 Pick. 291.

[915] Tripp v. Swanzey Paper Co., 13 Pick. 291.

[916] Railway Co. v. Allerton, 18 Wall. 233.

[917] People v. Ballard, 134 N. Y. 269; Abbott v. American Hard Rubber Co., 33 Barb. 578.

[918] Rollins v. Clay, 33 Me. 132.

[919] Frankfort Bank v. Johnson, 24 Me. 490.

They may, however, make an assignment for the benefit of creditors where the corporation is insolvent.[920] They are liable if they act contrary to the charter or by-laws.[921]

c. Delegation of powers of directors.

"We think they [directors] do not exercise a delegated authority in the sense in which the rule applies to agents and attorneys, who exercise the powers expressly conferred upon them and no others. We think, therefore, that a board of directors may delegate an authority to a committee of their own number, to alienate or mortgage real estate; that an authority to convey necessarily implies an authority to execute suitable and proper instruments for that purpose; and, in case of a corporation, to affix the corporate seal to an instrument requiring it." [922]

As to the details of corporation business, it is said: "The universal practice is to commit such matters of current and ordinary business to committees, superintendents and clerks. With respect to such business, it may be said that authority to bind the company may be delegated, because it has not been confided to the personal judgment and discretion of the directors." [923] In accordance with this principle it was held in New York that, independently of any statute, a board of twenty-three directors could delegate to a quorum of any five of their number authority to transact all ordinary business.[924]

Power to act not only in purely ministerial matters, but in matters involving discretion, may be delegated. Thus directors may delegate to an officer the discretion to employ an attorney

[920] Sargent v. Webster, 13 Met. 497, 503.

[921] Citizens', etc., Savings Ass'n v. Coriell, 34 N. J. Eq. 383.

[922] Burrill v. Nahant Bank, 2 Met. 163, 167, per Shaw, C. J. Cf. Bates v. Keith Iron Co., 7 Met. 224, where certain powers were vested by the by-laws in an agent. See 3 Clark & Marshall, Corp., §§ 731, 732.

[923] Metropolitan Telephone Co. v. Domestic Telegraph Co., 44 N. J. Eq. 568; Jones v. Williams, 139 Mo. 1.

[924] Hoyt v. Thompson's Executor, 19 N. Y. 207. Probably they could not delegate the management of the corporate business to one of their number. Olcott v. Tioga R. Co., 27 N. Y. 558.

and to collect claims;[925] and, in general, may delegate the power to appoint agents.[926]

Not all powers of directors, however, can be delegated. Where the statute expressly imposes upon them a duty, and makes them liable for the performance of that duty, they cannot delegate it. Such a duty is that with regard to making dividends or distributing the property of the corporation on winding up.[927]

d. Liability for fraud.[928]

Directors stand in a fiduciary relation to the corporation, and are bound to act for its benefit. They cannot, therefore, enter into contracts or make purchases or sales to its prejudice, and to the advantage of themselves or others.[929]

If such action is taken, the corporation may, upon learning all the facts, ratify the transaction or repudiate it, or may charge the directors with the profits made by them, upon an implied trust for its benefit;[930] and if the corporation will not act, stockholders may.[931] "As a general rule, a contract between a corporation and its directors is not absolutely void, but voidable at the election of the corporation. Such a contract does not necessarily require any independent and substantive act of ratification, but it may become finally established as a

[925] Bristol County Savings Bank v. Keavy, 128 Mass. 298 (treasurer); Trustees of Smith Charities v. Connolly, 157 Mass. 272 (president and general manager).

[926] Pierce v. Morse-Oliver Co., 94 Me. 406.

[927] Penn. Iron Works v. Mackenzie, 190 Mass. 61.

[928] As to criminal liability, see supra, § 17, *n*. As to actions by minority stockholders, see infra, § 24, *b*.

[929] Parker v. Nickerson, 112 Mass. 195 (where directors sold to their corporation a ferry boat at a larger price than they had paid for it); Von Arnim v. American Tube Works, 188 Mass. 515; Elliott v. Baker, 194 Mass. 518 (where directors issued treasury stock to put friends in control); European & N. A. Railway v. Poor, 59 Me. 277; Cusick v. Bartlett, 91 Me. 153; Symonds v. Lewis, 94 Me. 501; Land Co. v. Lewis, 101 Me. 78; Wardell v. Union Pacific R. Co., 103 U. S. 651. See also Snow v. Boston, etc., Manuf. Co., 153 Mass. 456, 158 Mass. 325.

[930] Parker v. Nickerson, 112 Mass. 195, 196; Parker v. Nickerson, 137 Mass. 487; Kelley v. Newburyport Horse Railroad, 141 Mass. 496.

[931] Infra, § 24, *b*.

valid act by acquiescence. The right to avoid it may be waived." [932]

There is no objection to a contract between a corporation and its directors or any of them, if it is open and made with the express or implied assent of the stockholders; [933] and if an officer of a corporation sells something to it at the market price, the mere fact that he bought it previously at a lower price will not make him chargeable for the profits, unless he bought it intending to sell it to the company, and it was then his duty to buy it for the company.[934]

So, directors may lend money to a corporation and receive payment of their loans, in the ordinary course of business, without rendering themselves liable to other creditors of the corporation.[935]

Remedy in equity.

Where officers and directors are guilty of breaches of fiduciary relations, involving personal advantages to themselves, the corporation has a remedy in equity as well as at law; [936] and the remedy survives against the defendant's estate.[937]

Separate decrees may be made against individual defendants if necessary,[938] including a decree against the estate of an

[932] Kelley v. Newburyport Horse Railroad, 141 Mass. 496, 499, per C. Allen, J. (where the holding and operating of a railroad for nearly ten years was held to ratify a purchase); Union Pacific Railroad v. Credit Mobilier, 135 Mass. 367, 376; Warren v. Para Rubber Shoe Co., 166 Mass. 97. See also Fort Payne Rolling Mill v. Hill, 174 Mass. 224; Nye v. Storer, 168 Mass. 53, 55.

[933] Warren v. Para Rubber Shoe Co., 166 Mass. 97.

[934] Parker v. Nickerson, 137 Mass. 487, 497. Cf. supra, chap. IV, "Promotion." See also Fort Payne Rolling Mill v. Hill, 174 Mass. 224 (where a director employed upon commission to settle claims, bought them up and held them as security for advances); Weeks v. Parsons, 176 Mass. 570.

[935] Holt v. Bennett, 146 Mass. 437.

[936] Warren v. Para Rubber Shoe Co., 166 Mass. 97, 104; Bliss v. Parks, 175 Mass. 539; Citizens' Loan Association v. Lyons, 2 Stew. (N. J.) 110; Citizens' Building, etc., Association v. Coriell, 7 Stew. (N. J.) 383; Brinckerhoff v. Bostwick, 88 N. Y. 52, 99 N. Y. 185.

[937] Warren v. Para Rubber Shoe Co., 166 Mass. 97, 104; Wineburgh v. United States Steam, etc., Co., 173 Mass. 60; Von Arnim v. American Tube Works, 188 Mass. 515, 520; Concha v. Murrieta, 40 Ch. D. 543.

[938] Von Arnim v. American Tube Works, 188 Mass. 515, 520.

officer who has died;[939] and where several defendants have co-operated in a fraud, the joining them in one bill does not make it multifarious.[940]

A suit in equity can be brought not only by the corporation itself, but under certain circumstances, by stockholders whose rights are injured.[941] In such cases, however, the corporation is a necessary party to the bill.[942]

e. Liability for mismanagement.

Directors and other officers are liable not only for fraudulent acts constituting breaches of trust, but also for failure to use due care, skill and diligence in the management of the affairs of the corporation, including the control of their subordinates.[943]

They are not, however, liable for mere mistakes or errors of judgment,[944] or for mistakes of law.[945] Nor are they insurers of the fidelity of their subordinates; they are liable for losses occurring through the latter only where they are negligent in appointing or in supervising them.[946]

f. Liability to third persons.

Where directors make a contract which the corporation has no power to make, and each party is equally well informed as

[939] Von Arnim v. American Tube Works, 188 Mass. 515, 520.

[940] Von Arnim v. American Tube Works, 188 Mass. 515, 520; Lenz v. Prescott, 144 Mass. 505; Dunphy v. Traveller, etc., Assoc., 146 Mass. 495, 499; Bliss v. Parks, 175 Mass. 539, 543; Graves v. Corbin, 132 U. S. 571, 580.

[941] Tibbals v. Bidwell, 1 Gray, 399; Lyman v. Bonney, 101 Mass. 562; Peabody v. Flint, 6 Allen, 52. See also infra, § 24, *b*, "Rights of Minority Stockholders."

[942] Tibbals v. Bidwell, 1 Gray, 399; Lyman v. Bonney, 101 Mass. 562; Allen v. Turner, 11 Gray, 436; Von Arnim v. American Tube Works, 188 Mass. 515, 519.

[943] 3 Clark & Marshall, Corp., § 746; Bank of Mutual Redemption v. Hill, 56 Me. 385; Williams v. McKay, 40 N. J. Eq. 189; Ackerman v. Halsey, 37 N. J. Eq. 356.

[944] Lyman v. Bonney, 118 Mass. 222; Hun v. Cary, 82 N. Y. 65; Freeman v. Sea View Hotel Co., 57 N. J. Eq. 68; Citizens', etc., Savings Ass'n v. Coriell, 34 N. J. Eq. 383.

[945] Vance v. Phœnix Ins. Co., 4 Lea (Tenn.) 385.

[946] Briggs v. Spaulding, 141 U. S. 132.

to the facts, they are not personally liable. But if they act under a belief that they have power, and the other party advances money on the faith of their authority, they are liable in tort for the money advanced. And if they falsely represent that they have authority to act, they are also liable in tort.[947] So they are liable for false representations whereby third persons are induced to buy stock of the corporation or to deposit money with it.[948]

g. Executive committee.

The executive committee mentioned in the statute is a committee elected from and by the board of directors.[949]

Generally speaking, an executive committee is subject to the same rules as the directors,[950] and a majority may act, so that the absence of a minority will not invalidate the action taken.[951]

The present act provides that the "current and ordinary business of the corporation and such other duties as the by-laws may prescribe" may be delegated. Just what is "current and ordinary business" may be open to some doubt.[952]

It has been held that directors may delegate authority to alienate and mortgage real estate, and to execute the necessary

[947] Jefts v. York, 10 Cush. 392, 395. Cf. Wakeman v. Dalley, 51 N. Y. 27.

[948] Cole v. Cassidy, 138 Mass. 437.

[949] Cf. Sheridan Electric Light Co. v. Chatham Nat. Bank, 127 N. Y. 517.

[950] McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 282; Jenkins v. Union School District, 39 Me. 220; State v. Jersey City, 3 Dutch. 493. See Hoyt v. Thompson, 19 N. Y. 207; Metropolitan Telephone Co. v. Domestic Telegraph Co., 44 N. J. Eq. 568.

[951] McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 282; Canada-Atlantic, etc., S. S. Co. v. Flanders, 145 Fed. Rep. 875 (C. C. A., 1st Cir.); Kupfer v. South Parish in Augusta, 12 Mass. 185; Damon v. Granby, 2 Pick. 345; Hayward v. Pilgrim Society, 21 Pick. 270, 275, 277; Haven v. Lowell, 5 Met. 35, 42; Weymouth, etc., Fire District v. County Commissioners, 108 Mass. 142; Burleigh v. Ford, 61 N. H. 360. But a minority of the committee cannot act. Trott v. Warren, 11 Me. 227.

[952] See Cook on Corp., § 715; Metropolitan Telephone Co. v. Domestic Telegraph Co., 44 N. J. Eq. 568.

instruments therefor;[953] to execute deeds;[954] to sell and assign commercial paper;[955] and to endorse checks.[956]

The wording of the statute seems to imply that *only* "current and ordinary business" can be delegated to the committee.[957]

h. Special committees.

It seems that the statutory provision for an executive committee does not curtail the power of the stockholders to elect a committee for a particular purpose, whose action is to be subject to the approval of the directors.[958]

"Circumstances may warrant an inference that acts of a committee, openly done and extending over a considerable period of time, were known and assented to by those who appointed the committee. The directors represented the corporation, and if the directors knew and by silence acquiesced in the acts of the committee, that is enough. The vote of the stockholders would show what in the first instance was the actual authority of the committee, but the course of the directors might be considered in determining its ostensible authority. A secret or unknown limitation of authority imposed by the stockholders would not control an apparent authority from the directors, since the business was within the scope of the general authority of directors."[959]

The general theory of corporate management, however, makes the directors the executive power of the corporation, and the only control which stockholders have in the management of

[953] Burrill v. Nahant Bank, 2 Met. 163, 167.

[954] Arms v. Conant, 36 Vt. 744.

[955] Northampton Bank v. Pepoon, 11 Mass. 288; Stevens v. Hill, 29 Me. 133. Cf. Manchester, etc., R. Co. v. Fisk, 33 N. H. 297.

[956] Sheridan Light Co. v. Chatham Bank, 127 N. Y. 517.

[957] As to delegation of power to an executive committee at common law, see Canada-Atlantic, etc., S. Co. v. Flanders, 145 Fed. 875; Union Pacific R. Co. v. Chicago & Rock Island, 163 U. S. 564, 597; Charlestown, etc., Shoe Co. v. Dunsmore, 60 N. H. 85. See also 20 Harv. L. Rev. 225; Thompson on Corp., § 8481; Cook, 5th ed., § 715.

[958] This was done in McNeil v. Boston Chamber of Commerce, 154 Mass. 277.

[959] McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 285, per Allen, J. (question of the right of a building committee to vary the terms of competition, in an action against the corporation by a bidder).

the corporation is through the election of directors. Therefore, it seems that stockholders cannot, for example, appoint a committee of their own number to sell the property of the corporation, although if the directors ratify the action of such a committee, it then becomes the act of the corporation.

D. MEETINGS.

§ 20. Meetings of Stockholders.

"There shall be an annual meeting of the stockholders and the time and place of holding it, and the manner of conducting it, shall be fixed by the by-laws; but it shall be held within ninety days after the end of the fiscal year of the corporation. All meetings of stockholders shall be held in the commonwealth. A written or printed notice, stating the place, day and hour thereof, shall be given by the clerk, at least seven days before such meeting, to each stockholder by leaving such notice with him or at his residence or usual place of business, or by mailing it, postage prepaid, and addressed to each stockholder at his address as it appears upon the books of the corporation. Unless the by-laws otherwise provide, a majority in interest of all stock issued and outstanding and entitled to vote shall constitute a quorum. Notices of all meetings of stockholders shall state the purposes for which the meetings are called. No notice of the time, place or purpose of any regular or special meeting of the stockholders shall be required if every stockholder, or his attorney thereunto authorized, by a writing which is filed with the records of the meeting, waives such notice." [960]

a. Who may call meetings.

The statute provides that the clerk shall send out the notices of the annual meeting. Meetings other than the annual meeting may be called by the president or by a majority of the directors, and the clerk is required to call a special meeting upon the application of three or more stockholders owning at least

[960] St. 1903, c. 437, § 20; St. 1904, c. 207. Cf. R. L., c. 110, § 26; Pub. St., c. 106, § 28. As to certificate of change in date of annual meeting, see supra, § 13, *f*.

one-tenth of the stock.[961] Special provisions in charters or by-laws must be followed.[962]

b. Time and place of meeting.

The statute requires all stockholders' meetings to be held in Massachusetts. In this respect it follows the law of Maine, New Jersey and New York, and is unlike the law of Delaware (except meetings for organization) and West Virginia.[963]

Previous to April 2, 1904, the annual meeting was required to be held within sixty days after the end of the fiscal year instead of ninety days as at present.[964]

Under section 4(*h*) of the act, the corporation may make by-laws as to meetings as well as other matters,[965] but the only requirement expressly mentioned in the act as to be fixed by the by-laws is the time, place and manner of holding the *annual* meeting.[966]

The meeting must be held at the place[967] and time[968] mentioned in the notice, or the proceedings will be invalid.

Adjournment.

Unless there is some special provision in the charter or by-laws, the members may adjourn to a later hour of the same day or to another day, without notice.[969] But if the original

[961] Infra, § 22. *Historical.* As to the calling of meetings under the previous law, see Citizens' Mutual Fire Ins. Co. v. Sortwell, 8 Allen, 217, 222; Newcomb v. Reed, 12 Allen, 362, 364; Cogswell v. Bullock, 13 Allen, 90; Stebbins v. Merritt, 10 Cush. 27, 33.

[962] Evans v. Osgood, 18 Me. 213.

[963] Freeman v. Machias Water Power Co., 38 Me. 343; Ormsby v. Vermont Copper Co., 56 N. Y. 623.

[964] The change was made by St. 1904, c. 207. As to certificate of change in date of annual meeting, see supra, § 13, *f*.

[965] Coggswell v. Bullock, 13 Allen, 90.

[966] If there are special provisions in the charter they must, of course, be followed. Johnston v. Jones, 23 N. J. Eq. 216.

[967] Miller v. English, 21 N. J. L. 317.

[968] State v. Bonnell, 35 Ohio St. 10.

[969] Smith v. Law, 21 N. Y. 296; Penobscot, etc., R. Co. v. Dunn, 39 Me. 587; State v. Phillips, 79 Me. 506, 11 Atl. 274; Hardenburg v. Farmers', etc., Bank, 3 N. J. Eq. 68; People v. Batchelor, 22 N. Y. 128.

meeting is invalid by reason of lack of notice, the adjourned meetings will be invalid also.[970]

c. Notice of meeting.

Where stockholders are duly notified of a meeting, the corporation alone is regarded by the law, and the individual members of the corporation are presumed to be competent to transact business. Therefore, the fact that one of the stockholders is incapable of receiving a legal notice on account of imbecility does not invalidate the meeting.[971]

It is essential that when any important business is to be transacted, it should be mentioned in the notice of the meeting, and a mere notice that the stockholders are to meet "for the transaction of such business as may come before them" is not ordinarily sufficient notice to make the votes, on a matter of special importance, binding. Thus, under such a vague notice, it was held that a corporation could not enlarge the number of directors and elect the additional members.[972]

There is a presumption that notice of a meeting was duly given.[973]

d. Presiding officer.

Although the president of the corporation ordinarily presides at meetings, and although he must be a stockholder unless the by-laws otherwise provide,[974] yet one who is not a stockholder may preside at a corporation meeting.[975]

A by-law providing that the president of the corporation "shall preside at all meetings of the stockholders and shall

[970] Wiggin v. Freewill Baptist Church, 8 Met. 301, 310.

[971] Stebbins v. Merritt, 10 Cush. 27, 33.

[972] People's Mutual Ins. Co. v. Wescott, 14 Gray, 440. Cf. Atlantic De Laine Co. v. Mason, 5 R. I. 463, 471. In Citizens' Gas Light Co. v. Wakefield, 161 Mass. 432, 438, it was held that a vote of the stockholders ratifying the action of directors in ordering the filing of a schedule preliminary to the purchase of the corporation's plant by a town, was within a notice for taking action upon a proposition to sell the plant and assets and to transact such other business as should come before the meeting.

[973] Sargent v. Webster, 13 Met. 497, 504. See also infra, *f*.

[974] Supra, § 18.

[975] Stebbins v. Merritt, 10 Cush. 27.

have a casting vote at all such meetings" does not entitle the president to cast a deciding vote after he has already voted once.[976]

e. Quorum and voting.[977]

Unless the by-laws otherwise provide, the statute makes a majority of shares a quorum.[978] This is important, because in the absence of statute and by-law provision any two stockholders would be a quorum.[979] It is not necessary that the record of a meeting should show that a quorum was present. If the record shows that the meeting was duly called and that proper notice of it was seasonably given, the law will assume that a quorum was present.[980] Except in the case of co-operative associations and unpaid shares, each share carries a vote.[981] Cumulative voting, where each stockholder has as many votes as there are directors to be elected and can cast them all for one or more, is not provided for. Measures must be adopted at a meeting, and absent members cannot pass measures by consent.[982]

f. Proof of meeting.

Where the minutes of a meeting have been lost and never extended upon the record, their contents may be proved by parol,[983] and there is a presumption that a meeting appar-

[976] Lamb v. McIntire, 183 Mass. 367.

[977] As to the casting of a deciding vote by the president, see supra, under *d*. As to the right to vote, see also infra, §§ 24, 29.

[978] Cf. Durfee v. Old Colony, etc., R. Co., 5 Allen, 230, 242; Hale v. Cheshire R. Co., 161 Mass. 443.

[979] Sharpe v. Dawes, 2 Q. B. Div. 26; Field v. Field, 9 Wend. 394.

[980] Citizens' Mutual Fire Ins. Co. v. Sortwell, 8 Allen, 217, 223.

[981] St. 1903, c. 437, § 24.

[982] Dennis v. Joslin Mfg. Co., 19 R. I. 666. Cf. Torrey v. Baker, 1 Allen, 120.

[983] Wallace v. Townsend Parish, 109 Mass. 263.

[984] Thayer v. Stearns, 1 Pick. 109; Gilmore v. Holt, 4 Pick. 258; Narragansett Bank v. Atlantic Silk Co., 3 Met. 282; Wallace v. Townsend Parish, 109 Mass. 263; Blanchard v. Dow, 32 Me. 557. See also Braintree Water Supply Co. v. Braintree, 146 Mass. 482; Sargent v. Webster, 13 Met. 497, 504.

ently regular was duly called and held,[984] and that a quorum was present.[985]

g. Ratification of unauthorized acts.[986]

Where an officer or agent or a part of the stockholders have performed unauthorized acts, ratification or acquiescence by all the stockholders will remove any defect of authority, though it cannot make the act valid as against the State if it is in violation of statute or the charter.[987]

So, as to matters within the control of the majority of the stockholders, a subsequent ratification will in general be equivalent to prior authorization.[988] It is for this reason that it is customary to pass a vote at the annual meeting ratifying and confirming the acts of the directors during the preceding year, and sometimes also the action taken at special meetings.

h. Fiscal year.

The statute does not prescribe any date for the ending of the fiscal year of the corporation, but only that the annual meeting must be held within ninety days thereafter. The United States national banks, and many other corporations have a fiscal year ending June 30; but this matter depends largely on the nature of the corporation's business.

In organizing a new corporation, in February, for example, it may be provided that the first fiscal year shall end on June 30 following; or that it shall end on June 30 of the next year. In either case, the commissioner of corporations does not in practice require any annual return for a period of less than eighteen months from the formation of the corporation.

[985] Citizens' Mutual Fire Ins. Co. v. Sortwell, 8 Allen, 217, 223.

[986] See also, as to Rights of Minority Stockholders, infra, § 24, *b*.

[987] Simmons v. Shaw, 172 Mass. 516; Kent v. Quicksilver Mining Co., 78 N. Y. 159; Danbury, etc., R. Co. v. Wilson, 22 Conn. 435; Kennebec, etc., R. Co. v. Palmer, 34 Me. 366; Gifford v. New Jersey R. Co., 10 N. J. Eq. 176; Freeman v. Machias Water Power, etc., Co., 38 Me. 345; Hotel Co. v. Wade, 97 U. S. 13. Cf. Stebbins v. Merritt, 10 Cush. 27, 34; Proprietors of Canal Bridge v. Gordon, 1 Pick. 296.

[988] 2 Mor. Corp., § 626; Hayward v. Pilgrim Society, 21 Pick. 270; Arlington v. Pierce, 122 Mass. 270.

It may be more convenient to dispense with an annual meeting until the following year, and therefore to make the first fiscal year more than twelve months.

§ 21. Stockholders' meetings called by a justice of the peace.

"If, by reason of the death or absence of the officers of a corporation or other cause, there is no person duly authorized to call or preside at a legal meeting, or if the clerk or other officer refuses or neglects to call it, a justice of the peace may, upon written application of three or more of the stockholders, issue a warrant to any one of them, directing him to call a meeting by giving such notice as is required by law, and may, by the same warrant, direct him to preside at the meeting until a clerk is duly chosen and qualified, if no officer of the corporation is present who is legally authorized to preside." [989]

It seems that this section applies only where there is neither any person authorized to call a meeting nor to preside thereat, for any person though not a stockholder can preside at a corporation meeting.[990]

§ 22. Special meetings.

"Special meetings of the stockholders may be called by the president or by a majority of the directors, and shall be called by the clerk upon written application of three or more stockholders who are entitled to vote and who hold at least one-tenth part in interest of the capital stock, stating the time, place and purpose of the meeting." [991]

§ 23. Voting rights of corporation.

"No corporation shall, directly or indirectly, vote on any share of its own stock." [992]

[989] St. 1903, c. 437, § 21; R. L., c. 109, § 15; Pub. St., c. 105, § 11; Gen. St., c. 68, § 5; Rev. St., c. 44, § 4; St. 1833, c. 49. Not cited to 193 Mass. This section is the same as in the Revised Laws.

[990] Stebbins v. Merritt, 10 Cush. 27.

[991] St. 1903, c. 437, § 22. This section is new. Even under the old law the directors could call a special meeting, though the by-laws provided that some officer must call one upon application of stockholders. Citizens' Mutual Fire Ins. Co. v. Sortwell, 8 Allen, 217, 222.

[992] St. 1903, c. 437, § 23. Cf. New Jersey L. 1896, c. 185, § 38. Re St. Lawrence Steamboat Co., 44 N. J. L. 529, 539.

This section is declaratory of the previous rule in this State,[993] and the rule applies equally to stock held by a trustee for the benefit of the corporation, while it is so held.[994]

a. Right of corporation to purchase its own stock.[995]

A corporation in this State has always been able to purchase its own stock.[996] Such purchase must, however, be in good faith and not to the injury of the corporation's creditors.[997] A corporation may also take its own stock in payment of a previously contracted bona fide debt.[998]

"It has not been considered in this Commonwealth that shares in a corporation are necessarily extinguished by being transferred to the corporation, so that they cannot be reissued, or that the amount of capital stock is thereby reduced." [999]

"A corporation cannot literally be one of its own stockholders in the full sense of that term. Such a transfer might not operate as a mere surrender or cancellation of stock, unless so intended. It would not diminish the amount of the capital, nor unnecessarily reduce the number of shares. The corporation might perhaps receive such a transfer, and hold the

[993] American Railway Frog Co. v. Haven, 101 Mass. 398; Com. v. Boston & Albany R. Co., 142 Mass. 146; Lowell, Transfer of Stock, 26.

[994] American Railway Frog Co. v. Haven, 101 Mass. 398. Cf. McNeely v. Woodruff, 13 N. J. L. 352; Brewster v. Hartley, 37 Cal. 15. The same is true even where the stock held by the corporation is pledged. Brewster v. Hartley, 37 Cal. 15.

[995] As to the holding of shares in trust for the corporation, see infra, § 33, *d*.

[996] Dupee v. Boston Water Power Co., 114 Mass. 37; New England Trust Co. v. Abbott, 162 Mass. 148, 152, 38 N. E. Rep. 432; Lindsay v. Arlington, etc., Association, 186 Mass. 371, 374; Leonard v. Draper, 187 Mass. 536.

Cf. Chapman v. Ironclad Rheostat Co., 62 N. J. L. 497; Berger v. U. S. Steel Co., 63 N. J. Eq. 809, 53 Atl. 68.

[997] Clapp v. Peterson, 104 Ill. 26; Crandall v. Lincoln, 52 Conn. 73; Re Columbian Bank, 147 Pa. St. 422.

[998] 1 Clark & Marshall, Corp., § 202; Currier v. Lebanon Slate Co., 56 N. H. 262; City Bank v. Bruce, 17 N. Y. 507.

[999] Com. v. Boston & Albany R. Co., 142 Mass. 146, 155, 7 N. E. Rep. 716, per C. Allen, J., citing Crease v. Babcock, 10 Met. 525, 526; American Railway Frog Co. v. Haven, 101 Mass. 398, 402; Dupee v. Boston Water Power Co., 114 Mass. 37, 43. Cf. City Bank v. Bruce, 17 N. Y. 507; State v. Smith, 48 Vt. 266, 285; Currier v. Lebanon Slate Co., 56 N. H. 262, 268.

stock so conveyed to it for the purpose of reissue to new subscribers or purchasers." [1000]

§ 24. Voting powers of stockholders.[1001]

"Stockholders who are entitled to vote shall, except as provided in section ninety-three, have one vote for each share of stock owned by them. Capital stock shall not be voted upon if any instalment of the subscription therefor which has been duly demanded under the provisions of section sixteen is overdue and unpaid. Stockholders may vote either in person or by proxy. No proxy which is dated more than six months before the meeting named therein shall be accepted, and no such proxy shall be valid after the final adjournment of such meeting." [1002]

Section 93, above referred to, provides that, in the case of a co-operative association, every member shall have only one vote on one subject.

This section makes impossible any system of cumulative voting such as is allowed in New Jersey.[1003]

a. The right to vote.

"The general rule is that the books of the corporation are the evidence of the persons who are entitled to the rights and privileges of stockholders in the management of the affairs of the corporation. . . . The books of the corporation are the only evidence of who are the stockholders, and as such are entitled to vote at elections.[1004]

"A corporation has to go by its record in determining the right to vote, and therefore, if a certificate of stock shows a

[1000] American Railway Frog Co. v. Haven, 101 Mass. 398, 402, per Ames, J. That the merger depends on intention, see 2 Clark & Marshall, Corp., 1302; Vail v. Hamilton, 85 N. Y. 453. Cf. State Bank v. Fox, 3 Blatch. 431.

[1001] As to the voting rights of fiduciary holders of the stock, see infra, § 29. As to quorum, etc., see supra, § 20, *e*.

[1002] St. 1903, c. 437, § 24; R. L., c. 110, § 25; Pub. St., c. 106, § 27; St. 1870, c. 224, § 19; Gen. St., c. 60, § 7; Rev. St., c. 38, § 7. Not cited to 193 Mass. This section is largely new.

[1003] P. L. 1900, p. 418. At common law each stockholder was entitled to only one vote. Taylor v. Griswold, 14 N. J. L. 222, 237.

[1004] Re St. Lawrence Steamboat Co., 44 N. J. L. 529, 539.

certain person to be a member the corporation must recognize him as a member, with the right to vote as an incident to his membership."[1005] The possession of a certificate is not, however, necessary to constitute one a shareholder.[1006]

A subscriber may vote although part of his subscription is unpaid, unless it is overdue and a demand has been made for it.[1007]

It is usual to provide in the by-laws, or by vote of the directors, for closing the transfer books a certain number of days before a dividend day; and it may similarly be provided that, as to other meetings, the transfer books of a certain date shall determine who is entitled to vote.[1008] It is proper and customary to insert copies of such by-laws in the notices of meetings.

Section 28 of the act provides that in cases of pledge the pledgor alone shall be entitled to vote, where a certificate of stock describing the pledge is issued to the pledgee.

In the case of shares owned jointly by two or more, unless they can agree how to vote, no vote can be cast by them.[1009]

b. Rights of minority stockholders.[1010]

In the absence of fraud, a majority vote controls and the motives of the voters are immaterial;[1011] but if persons owning a majority of the stock and controlling the election of directors take advantage of their position to obtain personal advantage, through contracts made with the corporation, or through obtaining its assets, or to do ultra vires acts, any

[1005] J. H. Wentworth Co. v. French, 176 Mass. 442, 443; per Holmes, C. J., 57 N. E. Rep. 789; Crease v. Babcock, 10 Met. 525, 546; National Bank v. Case, 99 U. S. 628, 631; Adderly v. Storm, 6 Hill, 624, 627; Commonwealth v. Dalzell, 152 Pa. 217, 223, 25 Atl. Rep. 535; State v. Ferris, 42 Conn. 560.

[1006] See infra, § 26.

[1007] Downing v. Potts, 23 N. J. L. 66; Savage v. Ball, 17 N. J. Eq. 142.

[1008] Hoppin v. Buffum, 9 R. I. 513.

[1009] Tunis v. Hestonville, etc., R. Co., 149 Pa. St. 70; Hey v. Dolphin, 92 Hun, 230, 36 N. Y. S. 627.

[1010] As to fraud and mismanagement by directors, see supra, § 19, *e*, *f*.

[1011] Durfee v. Old Colony, etc., R. Co., 5 Allen, 230, 242; Hale v. Cheshire R. Co., 161 Mass. 443; Faulds v. Yates, 57 Ill. 416, 419; Barnes v. Brown, 80 N. Y. 527; Gifford v. New Jersey R. Co., 10 N. J. Eq. 171.

minority stockholder may sue in equity, on his own behalf and on behalf of all non-participating stockholders to enjoin the majority or to have the fraudulent transaction set aside.[1012]

In such a suit, the stockholder must ordinarily show that the directors are unwilling to bring suit in the name of the corporation;[1013] but, demand being material only as showing that the corporation is itself unable to protect the rights of its members, if there is any reason why an attempt to induce the corporation to sue would be nugatory, it need not be made.[1014]

It is not enough, however, to dispense with asking relief through the corporation, that one director controls the board, unless there has been fraud or misconduct on the part of the other directors;[1015] and a mere request to the directors without stating the facts on which a bill could be maintained is not sufficient.[1016]

Such a suit is open to the usual defenses in equity, such as

[1012] 2 Clarke & Marshall, Corp., § 540; Peabody v. Flint, 6 Allen, 52; Brewer v. Boston Theatre, 104 Mass. 378, 395; Dunphy v. Traveller Association, 146 Mass. 495; Converse v. Hood, 149 Mass. 471; Warren v. Para Rubber Co., 166 Mass. 97, 100; Blair v. Telegram Newspaper Co., 172 Mass. 201; Wineburgh v. United States Steam Co., 173 Mass. 60; Dillaway v. Boston Gas Light Co., 174 Mass. 80; Boston & Maine R. R. v. Graham, 179 Mass. 62; Doane v. Preston, 183 Mass. 569; Weitze v. Burrage, 190 Mass. 267; Lawrence v. Curtis, 191 Mass. 240, 244; Von Arnim v. American Tube Works, 188 Mass. 515, 518; Eaton v. Robinson, 19 R. I. 146; Hersey v. Veazie, 24 Me. 9. See Abbott v. Merriam, 8 Cush. 588; Ward v. Salem St. Railway, 108 Mass. 332.

[1013] Brewer v. Boston Theatre, 104 Mass. 378; Dillaway v. Boston Gas Light Co., 174 Mass. 80, 97; Dunphy v. Traveller, etc., Assoc., 146 Mass. 495; Von Arnim v. American Tube Works, 188 Mass. 515, 517; Hawes v. Oakland, 104 U. S. 450; Greaves v. Gouge, 69 N. Y. 154.

[1014] Peabody v. Flint, 6 Allen, 52; Brewer v. Boston Theatre Co., 104 Mass. 378, 387; Dunphy v. Traveller Association, 146 Mass. 495; Wineburgh v. United States Steam, etc., Co., 173 Mass. 60; Von Arnim v. American Tube Works, 188 Mass. 515, 519; Dimpfell v. Ohio, etc., R. Co., 110 U. S. 209.

See also Blair v. Telegram Newspaper Co., 172 Mass. 201.

Where a bill did not allege any application to the corporation, but there was no demurrer and a master found an application would have been unavailing, it was held the bill would not be dismissed on that ground. Enos v. Church of St. John, 187 Mass. 40.

[1015] Dunphy v. Traveller, etc., Assoc., 146 Mass. 495.

[1016] Doherty v. Mercantile Trust Co., 184 Mass. 590.

laches,[1017] or acquiescence.[1018] But, where minority stockholders have been deliberately kept in ignorance by those managing the corporation, and have been refused access to the corporate books, the defense of laches is not open.[1019]

An individual stockholder cannot sue at law for an injury done to the corporation by conspiracy or otherwise; his remedy is by a suit at law by the corporation, or by a bill in equity, as above indicated, if the corporation will not act.[1020] He can sue at law only when he sustains some special injury distinct from that to the corporation or the other stockholders.[1021]

A vote of the majority affecting the liability of a minority who are debtors to the corporation, cannot be regarded as assented to by the minority, if they were not present at the meeting at which the vote was passed, even though they had legal notice of the meeting.[1022]

In all suits by minority stockholders, the corporation is a necessary party;[1023] for where defendants are deemed to make restitution, reimbursement is generally made to the corporation, although to avoid circuity of action relief may be granted in same suit.[1024]

[1017] Doane v. Preston, 183 Mass. 569; Peabody v. Flint, 6 Allen, 52, 57; Dunphy v. Traveller, etc., Assoc., 146 Mass. 495, 500; Royal Bank v. Grand Junction, etc., R. Co., 125 Mass. 490; Von Arnim v. American Tube Works, 188 Mass. 515, 518. See also Snow v. Boston, etc., Manuf. Co., 153 Mass. 456, 158 Mass. 325.

[1018] Boston & Maine Railroad v. Graham, 179 Mass. 62, 67; Boston, etc., R. Co. v. Boston & Lowell R. Co., 65 N. H. 393, 400; Dunphy v. Traveller, etc., Assoc., 146 Mass. 495, 500.

[1019] Von Arnim v. American Tube Works, 188 Mass. 515, 519; Dunphy v. Traveller, etc., Association, 146 Mass. 495; Doane v. Preston, 183 Mass. 569; Loring v. Palmer, 118 U. S. 321, 344; Bay State Gas Co. v. Lawson, 188 Mass. 502.

[1020] Converse v. United Shoe Machinery Co., 185 Mass. 422; Smith v. Hurd, 12 Met. 383; Wells v. Dane, 101 Me. 67.

[1021] Wells v. Dane, 101 Me. 67.

[1022] American Bank v. Baker, 4 Met. 164.

[1023] Von Arnim v. American Tube Works, 188 Mass. 515, 519. See Pratt v. Bacon, 10 Pick. 123, 126.

[1024] Von Arnim v. American Tube Works, 188 Mass. 515, 519; Dewing v. Perdicaries, 96 U. S. 193, 198; Smith v. Hurd, 12 Met. 371.

c. Voting trusts and agreements.

Whether a voting trust or agreement is legal, depends largely upon its purpose and effect. Such an agreement may be invalid, if it has for its purpose the placing or keeping in office of certain individuals,[1025] or enabling a majority of the stockholders to control the corporation for their own benefit, or for the benefit of other individuals or corporations.[1026]

This is on the principle that the theory of a corporation is that each stockholder shall give the others the benefit of his judgment and vote in favor of the best interests of the corporation.[1027] If, therefore, the stockholders irrevocably exclude themselves from the exercise of any personal judgment as to corporation affairs for a definite time or make any exclusive benefit out of the combination, the voting trust is void as against public policy.[1028]

[1025] See infra, *d*.

[1026] Shepaug Voting Trust Cases, 60 Conn. 553; White v. Thomas Inflatable Tire Co., 52 N. J. Eq. 178; Cone v. Russell, 48 N. J. Eq. 208; Williams v. Montgomery, 148 N. Y. 519; Harvie v. Linville Improvement Co., 118 N. C. 693.

[1027] Shepaug Voting Trust Cases, 60 Conn. 553.

[1028] Kreisel v. Distilling Co. of America, 61 N. J. Eq. 5. In this case, p. 14, Magie, C., said: "I conceive it is impossible to maintain that a proxy which confides to the attorney thereunder the power to exercise his judgment in certain cases, and so separates the voting power from the ownership of the stock, is void *per se*. The principle may, doubtless, limit the power conferred to voting on certain questions and in a certain way. But if, as is customary, the power is unlimited, it must be exercised by the judgment and determination of the attorney on any questions which may be presented.

"The power of revocation is deemed sufficient to protect the rights of other stockholders. If, however, the stockholder undertakes to make irrevocable his grant of power and to denude himself for a fixed period of the power to judge and determine and vote as to the proper management and control of the affairs of the corporation, then whether the grant of power is good or not must depend on the purposes for which it is given.

"When the scheme devised does not embrace a grant of irrevocable powers by proxy, but seeks a similar object by the creation of a trust and the appointment of a trustee, to whom the title of the stock is conveyed, a like doctrine must be applied. If no provision is made for the conduct of the trustee, at least he would be bound to vote on the stock held in trust in accordance with the expressed wishes of the *cestui que trust;* but if the transfer of the legal title to the stock is made and accepted under an agreement of the stockholder which deprives him of all power

So an agreement, based merely on mutual promises, not to sell stock or to give proxies without the consent of all the parties to the agreement, is contrary to public policy and void.[1029] And in New Jersey it was held that, where a majority of the issued stock was put in trust, and the trustee was to vote so as to elect a portion of the board of directors nominated by one stockholder, and another portion nominated by other stockholders, the agreement was void as against subsequent purchasers of treasury stock not included in the agreement.[1030]

So, where the object of the voting agreement is practically to form a "trust" of several corporations, to control output, prices, etc., the agreement was held to be an unlawful attempt to form a partnership.[1031]

On the other hand, if majority stockholders think it is for the best interests of the corporation that it shall be managed in a certain way or by certain officers, and they do not intend

to direct the trustee, and all opportunity to exercise his own judgment in respect to the management of the affairs of the corporation, then whether the transaction is open to the objection of other stockholders, as depriving them of the right they have to the aid of their co-stockholders, must be dependent upon the purposes for which the trust was created, and the powers that were conferred.

"If stockholders, upon consideration, determine and adjudge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, I have no doubt that they may, by powers of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon. But if stockholders combine by either mode to entrust and confide to others the formulation and execution of a plan for the management of the affairs of the corporation, and exclude themselves by acts made and attempted to be made irrevocable for a fixed period, from the exercise of judgment thereon, or if they reserve to themselves any benefit to be derived from such a plan to the exclusion of other stockholders who do not come into the combination, then in my judgment such combination and the acts done to effectuate it, are contrary to public policy, and other stockholders have a right to the interposition of a court of equity to prevent its being put into operation."

[1029] Fisher v. Bush, 35 Hun, 641. But see Hey v. Dolphin, 92 Hun, 230.

[1030] White v. Thomas Inflatable Tire Co., 52 N. J. Eq. 178.

[1031] People v. North River Sugar Refining Co., 121 N. Y. 582; Mallory v. Hanaur Oil Works, 86 Tenn. 598; Ohio, etc., R. Co. v. State, 40 Ohio St. 668; State v. Standard Oil Co., 49 Ohio St. 137.

any wrong to the other stockholders, they may combine either by voting together, or by giving their proxies to certain persons to vote in a certain way.[1032]

Therefore, an agreement by subscribers that after the purchase of stock their interests shall be pooled, and that the syndicate stock "shall be voted at each annual meeting for a period of not less than three years for such board of directors as shall be named" by a committee of five of the subscribers, with power to a majority of them to fill any vacancy in the committee, is lawful.[1033] And there is nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a trustee with unrestricted power to vote upon it.[1034]

So, where an agreement is not necessarily void as against public policy, where other stockholders are at liberty to join in the agreement, and where no one appears to have been injured by its operation, one who joined in it will not be heard to complain of it.[1035]

As the statute prohibits the use of proxies more than six months old, or after the final adjournment of the meeting for which they were given,[1036] voting trusts in this State must be effected by a transfer of the stock to trustees who shall vote it, or must depend upon the voluntary votes of the parties to the agreement.

d. — Contracts as to filling offices.

There is nothing to prevent a stockholder from giving part of his shares to another in consideration of the latter's agree-

[1032] Smith v. San Francisco, etc., R. Co., 115 Cal. 584; Williams v. Montgomery, 68 Hun, 416, 148 N. Y. 519; Hey v. Dolphin, 92 Hun, 230; Moses v. Scott, 84 Ala. 608; Faulds v. Yates, 57 Ill. 416. Cf. Weitze v. Burrage, 190 Mass. 268; Lawrence v. Curtis, 191 Mass. 240.

[1033] Brightman v. Bates, 175 Mass. 105; Ohio, etc., R. Co. v. State, 49 Ohio St. 668, 32 N. E. 933.

[1034] Brightman v. Bates, 175 Mass. 105, 111; Brown v. Pacific Mail Steamship Co., 5 Blatch. 525, 527. See Greene v. Nash, 85 Me. 148; Bostwick v. Chapman, 60 Conn. 576.

[1035] Chapman v. Bates, 61 N. J. Eq. 208. See as to pooling agreements, Brown v. Pacific Mail Steamship Co., 5 Blatch. 525; Mobile, etc., R. Co. v. Nicholas, 96 Ala. 92; Commonwealth v. Patterson, 158 Pa. St. 476; Re Glen Salt Co., 17 N. Y. App. Div. 234, 45 N. Y. S. 568, 153 N. Y. 668.

[1036] See infra, *e*.

ment to become a director, if the stockholder owns or represents all the shares, and the person becoming director takes the office unhampered by pledges, and is important to the success of the company's plans.[1037] But an agreement by a stockholder to vote for a certain person as general manager and to increase salaries, in consideration of a sum of money paid him by another stockholder, is void as against public policy, unless consented to by all the stockholders.[1038] And query, whether it is not void even when all do assent.[1039]

A similar agreement in consideration of the purchase of stock in the corporation was held a fraud upon the corporation; and such fraud can be set up by the defendant even though he is a party to it.[1040] The same result was reached where the consideration for the employment of one of the owners of the stock was the giving of an irrevocable proxy for a period of time.[1041]

e. Proxies.

At common law proxies were not allowed, on the theory that each stockholder was entitled to the personal judgment of every other stockholder as to the affairs of the corporation.[1042] The theory of the statute is that the revocable nature of a proxy is a sufficient protection to the other stockholders;[1043] and a proxy is always revocable, unless coupled with an interest, even though in terms irrevocable.[1044]

[1037] Almy v. Orne, 165 Mass. 126.

[1038] Woodruff v. Wentworth, 133 Mass. 309; Guernsey v. Cook, 120 Mass. 501; West v. Camden, 135 U. S. 507, 521. Cf. Fuller v. Dame, 18 Pick. 472, 483.

[1039] Woodruff v. Wentworth, 133 Mass. 309, 314.

[1040] Guernsey v. Cook, 120 Mass. 501, 503. Cf. Fuller v. Dame, 18 Pick. 472.

[1041] Cone v. Russell, 48 N. J. Eq. 208.

[1042] Taylor v. Griswold, 2 Gr. (N. J.) 222.

[1043] Kreisel v. Distilling Co. of America, 61 N. J. Eq. 5, 14.

[1044] Schmidt v. Mitchell, 101 Ky. 570, 583; Woodruff v. Dubuque, etc., R. Co., 30 Fed. 91; Brown v. Pacific Mail Steamship Co., 5 Blatchf. 525; Reed v. Bank of Newburgh, 6 Paige, 337. The New Jersey statute authorizes proxies only in the case of *absent* stockholders. L. 1896, c. 185, § 17. Under this it was held that the personal appearance of a stockholder revoked the provy. Chapman v. Bates, 61 N. J. Eq. 658.

A proxy must be in writing, but no special form of wording or execution is necessary. It is sufficient if it purports to give the necessary authority and is free from any suspicion as to genuineness.[1045] In case of a special meeting, the proxy should be commensurate in scope with the purpose of the meeting.[1046]

The present statute provides expressly that no proxy shall be valid which is dated more than six months before a meeting, or after the final adjournment of such meeting. This effectually prevents long-term proxies.[1047]

§ 25. Directors' meetings

"Meetings of the board of directors may be held within or without the commonwealth. Any meeting of the board of directors shall be a legal meeting without notice if each director, by a writing which is filed with the records of the meeting, waives such notice." [1048]

The first clause of this section follows the usual rule.[1049]

a. Nature of meeting.

When the meeting is a regular or stated one, and the time and place fixed by the charter or by-laws, or by custom, no notice is necessary,[1050] unless required by the charter or by-laws.[1051]

Section 25 of the present act provides that meetings of the directors may be held out of the Commonwealth.

It seems that where it is impossible to notify all the directors of a meeting, the action of those present, although constituting

Our statute has a different wording, but it seems a stockholder can revoke his proxy by attending, or by other conduct, or orally. Schmidt v. Mitchell, 101 Ky. 570; Com. v. Patterson, 158 Pa. St. 476.

[1045] Re St. Lawrence Steamboat Co., 44 N. J. L. 529.

[1046] Abbot v. American Hard Rubber Co., 33 Barb. 578, 584.

[1047] Cf. Shepaug Voting Trust Cases, 60 Conn. 553.

[1048] St. 1903, c. 437, § 25.

[1049] Bank of Augusta v. Earle, 13 Pet. 519; Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. Rep. 316; Wood Hydraulic Co. v. King, 45 Ga. 34.

[1050] Whitehead v. Hamilton Rubber Co., 52 N. J. Eq. 78; Atlantic, etc., Ins. Co. v. Sanders, 36 N. H. 252.

[1051] Thompson v. Williams, 76 Cal. 153; Hill v. Rich Hill Coal Mining Co., 119 Mo. 9.

a majority of the whole board, is invalid.[1052] It is not necessary for the notice of a meeting to designate the business to be transacted, unless the latter is out of the ordinary course,[1053] and, in the absence of evidence to the contrary, it will be presumed that proper notice was given to all the directors.[1054]

b. Quorum.

As we have seen, the corporation may regulate the quorum of the directors by by-laws.[1055]

In the absence of other provision, a majority of the directors constitute a quorum and have authority to decide any question upon which the board can act.[1056] It is not necessary that the president of the corporation should be present to enable the board to do business,[1057] nor does the absence in Europe of a director deprive the corporation of the capacity to act, and bind itself by the acts of the officers in actual charge of its affairs.[1058]

It seems that where a bare quorum is present, and one or more directors are disqualified by interest from voting on a given proposition, the vote of the remaining members of the board is invalid.

c. Method of doing business.

The directors must act as a board, and not individually, in order to bind the corporation, in the absence of ratification or estoppel.[1059] At their meetings they cannot vote by proxy.[1060]

[1052] Farwell v. Houghton Copper Works, 8 Fed. Rep. 66; Chase v. Tuttle, 55 Conn. 455, 12 Atl. Rep. 874; Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. Rep. 203.

[1053] Re Argus Co., 138 N. Y. 557, 34 N. E. Rep. 388. Cf. supra, § 20, *c*.

[1054] Sargent v. Webster, 13 Met. 497.

[1055] Supra, § 13.

[1056] Ibid.; Penobscot, etc., R. Co. v. Dunn, 39 Me. 587; Pierce v. Morse-Oliver Co., 94 Me. 406.

[1057] Sargent v. Webster, 13 Met. 497.

[1058] Sherman v. Fitch, 98 Mass. 59, 64.

[1059] Henry Wood's Sons Co. v. Schaefer, 173 Mass. 443; Pierce v. Morse-Oliver Building Co., 94 Me. 406; Hamlin v. Union Brass Co., 68 N. H. 292; West Jersey Traction Co. v. Camden, etc., R. Co., 53 N. J. Eq. 163; Columbia Bank v. Gospel, etc., Church, 127 N. Y. 361; Trott v. Warren, 11 Me. 227; Morrison v. Wilder Gas Co., 91 Me. 492; Land Co. v. Lewis, 101 Me. 78.

[1060] 2 Op. Atty.-Gen. 275; Perry v. Tuscaloosa, etc., Co., 93 Ala. 364;

So in case of acquiescence or ratification, the board must act as a board and not individually.[1061]

It is not always necessary, however, that votes should be formal votes, or that the votes should be passed in formal meetings, or that they should be proved by the record, provided the board acts as such in what is done.[1062]

E. STOCK.

§ 26. Stock certificates.[1063]

"Each stockholder shall be entitled to a certificate, in form conformable to the provisions of section fourteen, which shall be signed by the president and by the treasurer of the corporation, shall be sealed with its seal and shall certify the number of shares owned by him in such corporation. Each certificate of stock which by the agreement of association or amended agreement of association or, in the case of a corporation created by special law, by its articles of organization is limited as to its voting rights, or which is preferred as to its dividend or as to its share of the principal upon dissolution, shall have a sufficient statement of such limitation or preference plainly written or stamped upon it, and each certificate subsequently issued of any class of stock in the corporation shall have printed or stamped thereon the clause of such agreement of association or amended agreement of association or articles of organization authorizing the issue of stock in any respect preferred or limited." [1064]

Craig Medicine Co. v. Merchants' Bank, 59 Hun, 561; Re Portuguese, etc., Co., 42 Ch. D. 160.

[1061] Pierce v. Morse-Oliver Co., 94 Me. 406.

[1062] Pierce v. Morse-Oliver Co., 94 Me. 406, 412, per Savage, J.

[1063] As to the issue of stock, see supra, § 14; as to fictitiously paid stock, see § 14, *g*; as to overissued stock, see § 14, *h*; as to treasury stock, see § 14, *f*.

[1064] St. 1903, c. 437, § 26; R. L., c. 110, § 27; Pub. St., c. 106, § 29; St. 1870, c. 224, § 23; St. 1874, c. 349, § 1; Gen. St., c. 60, § 10; St. 1852, c. 180; Rev. St., c. 38, § 10; St. 1829, c. 53, § 3; St. 1808, c. 65, § 3.

Citations. — St. 1870, c. 224, § 23: Loring v. Salisbury Mills, 125 Mass. 138.

Gen. St., c. 60, § 10: Loring v. Salisbury Mills, 125 Mass. 150.

Rev. St., c. 38, § 10: Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. 576.

St. 1808, c. 65, § 3: Chester Glass Co. v. Dewey, 16 Mass. 99; Troy & Greenfield R. R. Co. v. Newton, 8 Gray, 600. See also McGinty v. Athol Reservoir Co., 155 Mass. 185, 29 N. E. Rep. 510.

This section contains no provision for the consecutive numbering of certificates, such as was found in the Revised Statutes.[1065]

a. Nature of stock.

The stock of a corporation has been concisely defined to be "the sum of all the rights and duties of its stockholders, and it is divided for convenience into a definite number of equal shares."[1066] More concretely, it consists of the money or property put into a corporate fund by the subscribers to the stock,[1067] which is represented by the cash in the treasury, plant, machinery, goods and other assets of the corporation.

"Ownership of the property of a corporation is in the corporation and not in the holders of the shares of its stock. The interest of each stockholder consists of the right to a proportionate part of the profits whenever dividends are declared by the corporation, during its existence under its charter, and to a like proportion of property remaining upon the termination or dissolution of the corporation, after the payment of its debts.[1068] It follows from the fact that stock is the sum of the rights and duties of the stockholders that the capital stock of a corporation is liable for its debts, or, as it is usually expressed, the stock and especially any sums remaining due as unpaid subscriptions are a "trust fund" for creditors of the corporation.[1069]

Stock is now everywhere held to be a species of incorporeal personal property, even though the property of the corporation may consist partly or chiefly of real estate.[1070] But, although

[1065] Cf. Rev. St., c. 38, § 10. Holyoke Bank v. Goodman Paper Co., 9 Cush. 580.

[1066] Lowell on Transfer of Stock, § 4. Cf. Gray, C. J., in Fisher v. Essex Bank, 5 Gray, 372, 377.

[1067] Foster v. Seymour, 23 Fed. Rep. 65.

[1068] Gibbons v. Mahon, 136 U. S. 549, 557, per Gray, J.; Field v. Pierce, 102 Mass. 253, 261.

[1069] Clark v. Bever, 139 U. S. 96.

[1070] Hutchins v. State Bank, 12 Met. 421, 426, per Shaw, C. J.; Field v. Pierce, 102 Mass. 253, 261; Ellis v. Essex Bridge Proprietors, 2 Pick. 243; Sargent v. Franklin Ins. Co., 8 Pick. 90; Mass. Iron Co. v. Hooper, 7 Cush. 183; Com. v. Hamilton Mining Co., 12 Allen, 298, 309; Tippetts v. Walker, 4 Mass. 594; Hastings v. Blue Hill Turnpike Co., 9 Pick. 80.

shares are personal property, they are not chattels personal, susceptible of possession actual or constructive,[1071] nor are they mere credits.[1072] Though not choses in action, they are commonly said to be in the nature of choses in action.[1073]

Shares are precisely equal and equivalent to each other, and without "earmarks."[1074]

Shares of stock are "goods, wares or merchandise" within the provisions of the statute of frauds;[1075] but not, it seems, until they have been issued.[1076]

b. Nature of certificate.

A certificate of stock is a written instrument, reciting that a certain person named therein is the owner of a certain number of shares, signed by one or more officers of the corporation, and frequently countersigned by some trust company or registrar having charge of the issue and transfer of the stock. They are usually numbered for convenience, but the numbers are simply directory to assist in tracing title.[1077]

The certificates are not the same things as the shares. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation.[1078]

c. Right to certificate.

The possession of a certificate is not necessary to constitute any one a shareholder,[1079] for a person may be a stock-

[1071] Field v. Pierce, 102 Mass. 253, 261.

[1072] New Orleans, etc., Assoc. v. Wiltz, 10 Fed. Rep. 330.

[1073] Hutchins v. State Bank, 12 Met. 421, 426, per Shaw, C. J.; Field v. Pierce, 102 Mass. 253, 261; Howe v. Starkweather, 17 Mass. 240, 243.

[1074] Atkins v. Gamble, 42 Cal. 86, 100; Hubbell v. Drexel, 11 Fed. Rep. 115.

[1075] R. L., c. 74, § 5. Meehan v. Sharp, 151 Mass. 564; Tisdale v. Harris, 20 Pick. 9; Boardman v. Cutter, 128 Mass. 388; Pray v. Mitchell, 60 Maine, 430, 435.

[1076] Meehan v. Sharp, 151 Mass. 564.

[1077] Ind's Case, L. R., 7 Ch. App. 485.

[1078] Nesmith v. Washington Bank, 6 Pick. 324; Chester Glass Co. v. Dewey, 16 Mass. 94. As to a certificate where there were two certificates of the same name. See Craig Silver Co. v. Smith, 163 Mass. 262.

[1079] Ellis v. Essex Bridge Proprietors, 2 Pick. 243; Nesmith v. Washing-

holder,[1080] and can therefore transfer his shares[1081] before any certificate is issued to him, and if one has been issued a transfer can be made without using it.[1082] Indeed, it is not essential to the existence of a corporation that certificates should be issued at all,[1083] although if certificates be issued each owner of shares is entitled to one, apart from the wording of this section,[1084] and there is a presumption that a corporation does issue certificates, and that a stockholder is entitled to such usual evidence of that kind of property.[1085]

Until certificates are issued, the associated members of the corporation are holders of the whole capital stock in common.[1086]

d. Remedy for refusal or neglect to issue certificate.

The usual remedy for failure to issue a certificate is an action for damages. Where damages is an adequate remedy, mandamus will not lie.[1087] This would be, in general, when

ton Bank, 6 Pick. 324; Dewing v. Perdicaries, 96 U. S. 193, 196; Cartwright v. Dickinson, (Tenn.) 12 S. W. Rep. 1030; Upton v. Burnham, 3 Biss. 431, 8 N. B. R. 221, Fed. Cas. No. 16,798; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 395; Boston, etc., R. Co. v. Commonwealth, 157 Mass. 68, 70.

[1080] Comins v. Coe, 117 Mass. 45; Ellis v. Essex Bridge Proprietors, 2 Pick. 243.

[1081] Brigham v. Mead, 10 Allen, 245; First Nat. Bank of Davenport v. Gifford, 47 Iowa, 575.

[1082] Lowell, Transfer of Stock, § 44.

[1083] Dewing v. Perdicaries, 96 U. S. 193, 196; McAllister v. Kuhn, 96 U. S. 87; Hawley v. Upton, 102 U. S. 314; Chester Glass Co. v. Dewey, 16 Mass. 94; Agricultural Bank v. Burr, 24 Me. 256; Chaffin v. Cummings, 37 Me. 76, 83; Thorp v. Woodhull, 1 Sandf. Ch. 411; McGinty v. Athol Reservoir Co., 155 Mass. 185, 29 N. E. Rep. 510.

[1084] National Bank v. Watsontown Bank, 105 U. S. 217; Loring v. Frue, 104 U. S. 223; Field v. Pierce, 102 Mass. 253; Chester Glass Co. v. Dewey, 16 Mass. 94; Arnold v. Suffolk Bank, 27 Barb. 424; Johnson v. Albany, etc., R. Co., 40 How. Pr. 193. See Sargent v. Franklin Ins. Co., 8 Pick 90.

[1085] Hussey v. Manufacturers' etc., Bank, 10 Pick. 415.

[1086] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 397; Hawes v. Anglo-Saxon Petroleum Co., 111 Mass. 200.

[1087] Murray v. Stevens, 110 Mass. 95; Stackpole v. Seymour, 127 Mass. 104; Townes v. Nichols, 73 Me. 515; Bush v. Warren Co., 32 N. J. L. 429; State v. Timken, 48 N. J. L. 87; Galbraith v. Building Association. 43 N. J. L. 389.

the shares have an ascertainable market value, or can be bought in the market, and where incidental rights of ownership, such as eligibility to corporate offices or the right to vote at corporation meetings, do not depend upon the ownership of the specific shares in dispute, but would be equally satisfied by the ownership of an equal number of other shares. Such cases would necessarily be rare.

The action for damages, where the corporation refuses to recognize title to shares may be in contract,[1088] or in tort;[1089] and the measure of damages is the market value of the shares at the time of the demand and refusal, with interest.[1090]

Remedy in equity.

The corporation may be compelled in equity to issue a certificate, such action being for the specific performance of an express or implied contract to issue one.[1091]

A court of equity will also enjoin a stockholders' meeting until the transfer is made, where it has been fraudulently refused or withheld.[1092]

e. Forged certificates.[1093]

With respect to certificates on which one or more of the signatures of the officers of the corporation have been forged, the rule is that the corporation is liable if the forgery is committed and the certificates issued by the officer charged with the duty of finally signing and issuing them, provided the

[1088] Wyman v. American Powder Co., 8 Cush. 168, 180; Gray v. Portland Bank, 3 Mass. 364; Sargent v. Franklin Ins. Co., 8 Pick. 90.

[1089] Hussey v. Manufacturers' Bank, 10 Pick. 415, 423; Gray v. Portland Bank, 3 Mass. 364.

[1090] Hussey v. Manufacturers' Bank, 10 Pick. 415, 423; Wyman v. American Powder Co., 8 Cush. 168, 179, 182. Cf. Fisher v. Brown, 104 Mass. 259.

[1091] Iasigi v. Chicago, etc., R. Co., 129 Mass. 46; Chester Glass Co. v. Dewey, 16 Mass. 94, 101 (dictum); Kinnan v. Forty-second Street, etc., R. Co., 140 N. Y. 183; Reading Iron Works' Estate, 149 Pa. St. 182; Archer v. American Water Works Co., 50 N. J. Eq. 33.

[1092] Archer v. American Water Works Co., 50 N. J. Eq. 33.

[1093] As to the overissue of certificates on forged transfers, see supra, § 14, *h*.

purchaser or pledgee did not help to make the forgery possible by his negligence.[1094]

Conversely, where certificates were to be signed by the president, and signed and issued by the treasurer, it was held that, apart from negligence, the corporation was not liable, where the president forged the name of the treasurer and impressed the corporate seal.[1095]

§ 27. Classes of stock.

"Every corporation may create two or more classes of stock with such preferences, voting powers, restrictions and qualifications thereof as shall be fixed in the agreement of association or, in the case of a corporation created by special law, in the articles of organization, or in an amendment to said agreement or articles which may be adopted as hereinafter provided." [1096]

a. Special stock and employees' stock.

Until June 5, 1902, the only kinds of stock authorized, except ordinary common stock, were "special stock" [1097] and "employees' stock." [1098]

Although the language is not entirely clear, it would seem that the provisions of Revised Laws, chapter 110, covering the

[1094] 2 Clark & Marshall, Corp., § 432; citing, Shaw v. Port Philip, etc., Mining Co., 13 Q. B. Div. 103; Tome v. Parkersburg Branch R. Co., 39 Md. 36; Fifth Ave. Bank v. Forty-second St., etc., R. Co., 137 N. Y. 231; Mutual Life Ins. Co. v. Forty-second St., etc., R. Co., 74 Hun, 505.

[1095] Hill v. Jewett Publishing Co., 154 Mass. 172. Cf. Manhattan Life Ins. Co. v. Forty-second St., etc., R. Co., 139 N. Y. 146.

[1096] St. 1903, c. 437, § 27; St. 1902, c. 441. Not cited to 193 Mass.

[1097] As to special stock, see R. L., c. 110, § 36; Pub. St., c. 106, § 42; St. 1870, c. 224, § 25; Gen. St., c. 60, § 12; St. 1855, c. 290. Citations. — St. 1855, c. 290: Allen v. Herrick, 15 Gray, 274; Williams v. Parker, 136 Mass. 207; American Tube Works v. Boston Machine Co., 139 Mass. 9, 29 N. E. Rep. 63. Gen. St., c. 60, § 12: Williams v. Parker, 136 Mass. 207. St. 1870, c. 224, § 25: Williams v. Parker, 136 Mass. 207; American Tube Works v. Boston Machine Co., 139 Mass. 9, 29 N. E. Rep. 63. Pub. St., c. 106, § 42: Williams v. Parker, 136 Mass. 207; American Tube Works v. Boston Machine Co., 139 Mass. 9, 29 N. E. Rep. 63. R. L., c. 110, § 59; Pub. St., c. 106, § 61; St. 1870, c. 224, § 39; St. 1862, c. 218, § 2; Gen. St., c. 60, § 12; St. 1855, c. 290.

[1098] As to employees' stock, see R. L., c. 110, § 37; St. 1886, c. 209, § 1.

matter of special stock and employees' stock, were in terms repealed by section 95 of the present act. But, apart from this question, it is apparent that such classes of stock can now be created only by the charter or by an amendment to it, and not as provided in the Revised Laws; and therefore the provisions of the Revised Laws are inconsistent with the present act and are hence undoubtedly repealed by section 95.

b. Preferred stock.

Until June 5, 1902, corporations could not issue preferred stock,[1099] unless authorized by special statute.[1100]

Under the present statute there is full power to issue preferred stock at the time of the organization of the corporation. As to whether preferred stock can be issued after organization, see infra, § 40, d.

Unless it is otherwise stipulated in the articles of organization or the votes authorizing the issue of preferred stock, the preference extends only to dividends and not to division of assets.[1101] Preferred stockholders are entitled to receive the guaranteed dividend and arrears of dividends out of any profits that may be earned before the common stockholders receive anything,[1102] but are not entitled to priority over debts subse-

[1099] St. 1902, c. 441, partially repealed by St. 1903, c. 437, § 95. American Tube Works v. Boston Machine Co., 139 Mass. 5, 9, 29 N. E. Rep. 63. Cf. Kent v. Quicksilver Mining Co., 78 N. Y. 159; Belfast, etc., R. Co. v. Belfast, 77 Me. 445.

[1100] E. g. Greenfield Tool Co., by St. 1855, c. 143, Williams v. Parker, 136 Mass. 204. Other examples are St. 1853, c. 1; St. 1866, c. 257; St. 1877, c. 170; St. 1878, c. 138; St. 1882, c. 177; St. 1885, c. 349; St. 1886, c. 227; St. 1887, cc. 100, 413; St. 1890, c. 89; St. 1891, c. 83. Cf. Holland v. Cheshire R. Co., 151 Mass. 231; Kimball v. St. Louis, etc., R. Co., 157 Mass. 7.

[1101] McGregor v. Home Ins. Co., 33 N. J. Eq. 181, 183, 184.

[1102] Williston v. Michigan Southern, etc., R. Co., 13 Allen, 400; Barnard v. Vermont, etc., R. Co., 7 Allen, 512; Field v. Lamson, etc., Manuf. Co., 162 Mass. 388, 390; Boardman v. Lake Shore R. Co., 84 N. Y. 157, 174. In Williams v. Parker, 136 Mass. 204, where the charter required the corporation to guarantee dividends on special stock, it was held that the guaranty of dividends was an absolute one, and not conditional upon the earning of profits, and that the special stockholders were creditors to that extent. But in Williston v. Michigan Southern, etc., R. Co., 13 Allen,

quently contracted.[1103] Sometimes part of the preferred stock is to receive cumulative dividends ahead of the remaining preferred stock, for a certain period of time.[1104] In such a case, the more favored stock may be entitled to preference for the specified period, although no dividends are earned until after the expiration of such period from the formation of the corporation.[1105]

When preferred stock is transferred upon which dividends are overdue, these dividends pass to the transferee in the absence of special agreement.[1106]

§ 28. Transfer of stock.[1107]

"The delivery of a certificate of stock by the person named as the stockholder in such certificate or by a person entrusted by him with its possession for any purpose to a bona fide purchaser or pledgee for value, with a written transfer thereof, or with a written power of attorney to sell, assign or transfer the same, signed by the person named as the stockholder in such certificate, shall be a sufficient delivery to transfer title as against all persons; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until it has been recorded upon the books of the corporation, or until a new certificate has been issued to the person to whom it has been so transferred. Such purchaser, upon delivery of the former certificate to the treasurer of the corporation, shall be entitled to receive a new certificate. Stock shall not be transferred upon the books of the corporation, except as provided in section sixteen, if any instalments thereon remain overdue and unpaid. A pledgee of stock transferred as collateral security shall be entitled to a new certificate if the instrument of

400, where the dividends were guaranteed "out of net earnings," an opposite conclusion was reached as to preferred stockholders. Field v. Lamson, etc., Mfg. Co., 162 Mass. 388, 390, 393.

[1103] Warren v. King, 108 U. S. 389, 400.

[1104] Gardner Savings Bank v. Taber-Prang Art Co., 189 Mass. 363.

[1105] Gardner Savings Bank v. Taber-Prang Art Co., 189 Mass. 363. Cf. Staples v. Eastman Photographic Materials Co., [1896] 2 Ch. 303.

[1106] Jermain v. Lake Shore R. Co., 91 N. Y. 483.

[1107] As to By-laws Regulating Stock Transfer, see supra, § 13, *d*.

As to transfer after dissolution, see infra, § 52.

transfer substantially describes the debt or duty which is intended to be secured thereby. Such new certificate shall express on its face that it is held as collateral security, and the name of the pledgor shall be stated thereon, who alone shall be liable as a stockholder, and entitled to vote thereon." [1108]

The first sentence of this section took effect June 8, 1884.[1109] The last two sentences go back to 1838.

It will be observed that this section supersedes St. 1881, c. 302, and removes any doubts as to the matter of transfer caused by that statute.[1110]

[1108] St. 1903, c. 437, § 28; St. 1903, c. 423; R. L., c. 109, §§ 37, 38; St. 1884, c. 229; Pub. St., c. 105, § 25; Gen. St., c. 68, § 13; St. 1838, c. 98, § 3.

Citations. — St. 1903, c. 437, § 28: Chase v. Boston, 193 Mass. 526.

St. 1903, c. 423: Gurley v. Reed, 190 Mass. 512; Chase v. Boston, 193 Mass. 522.

R. L., c. 109, § 37; Clews v. Friedman, 182 Mass. 555.

St. 1884, c. 229: Central Bank v. Williston, 138 Mass. 246; Allen v. South Boston Railroad, 150 Mass. 204, 22 N. E. Rep. 917; Jones v. Atchison, T. & S. F. R. R., 150 Mass. 308, 23 N. E. Rep. 43; Andrews v. Worcester, etc., R. R., 159 Mass. 66, 33 N. E. Rep. 1109; O'Herron v. Gray, 168 Mass. 576, 47 N. E. Rep. 429; J. H. Wentworth Co. v. French, 176 Mass. 442, 57 N. E. Rep. 789; Russell v. Am. Bell Telephone Co., 180 Mass. 470, 62 N. E. Rep. 751; Clews v. Friedman, 182 Mass. 555.

Pub. St., c. 105, § 25; Gen. St., c. 68, § 13; St. 1838, c. 98, § 3: Gray v. Coffin, 9 Cush. 192; Central Nat. Bank v. Williston, 138 Mass. 246, 247; Waltham Bank v. Waltham, 10 Met. 340; Johnson v. Somerville, etc., Co., 15 Gray, 219; Newton v. Fay, 10 Allen, 506; Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 571; J. H. Wentworth Co. v. French, 176 Mass. 443, 57 N. E. Rep. 789.

See also, generally, Holyoke Bank v. Burnham, 11 Cush. 183.

[1109] The language of this statute, St. 1884, c. 229, was as follows:

"The delivery of a stock certificate of a corporation to a bona fide purchaser or pledgee, for value, together with a written transfer of the same, or a written power of attorney to sell, assign or transfer the same, signed by the owner of the certificate shall be a sufficient delivery to transfer the title as against all parties; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation, or a new certificate is issued to the person to whom it has been so transferred."

[1110] St. 1881, c. 302; Pub. St., c. 105, § 24, read as follows:

"No sale, assignment, or transfer of stock in a corporation shall affect the right of the corporation to pay any dividend due upon the same, or affect the title or rights of an attaching creditor, until it is recorded upon

a. Generally.

There are three ways in which stock may be assigned: (1) By mere delivery of the certificate without any writing. This is good as a *donatio causa mortis,*[1111] but query, whether it is good as a gift in this Commonwealth *inter vivos.*[1112]

(2) By a formal assignment signed by the transferor. This assignment is usually printed on the back of the certificate. In such a case, in order to effect registration, the transferor must go to the office of the corporation and sign the transfer in the transfer book.

(3) By a formal assignment combined with a power of attorney to make the transfer on the transfer book. The name of the attorney is usually left blank and is filled in with his own name by the transfer clerk.

Such a power of attorney is not revoked by the death of the transferor before use.[1113]

In the last two cases, if the name of the assignee is not filled in it is called a transfer "in blank."[1114]

the books of the corporation or a new certificate is issued to the person to whom it has been transferred; but no attachment of such stock as the property of the vendor, made after such sale, assignment or transfer, shall defeat the title or affect the rights of the vendee, if such record is made or a new certificate issued within ten days after such transfer is made."

Historical. Prior to this statute, a transfer without registration was held to be valid as against attaching creditors, unless the charter provided that shares should be transferable only upon the books, and in such case registration was necessary to protect against attachments. Fisher v. Essex Bank, 5 Gray, 373, 378; Boston Music Hall Association v. Cory, 129 Mass. 435, 437; Sargent v. Essex Marine Railway, 9 Pick. 201; Sargent v. Franklin Ins. Co., 8 Pick. 90; Dickinson v. Central National Bank, 129 Mass. 279.

There were, however, few corporations whose shares were not required to be transferred upon the books. Clews v. Friedman, 182 Mass. 555; Blanchard v. Dedham Gas Light Co., 12 Gray, 213.

[1111] Grymes v. Home, 49 N. Y. 17.

[1112] Morse v. Meston, 152 Mass. 5. In New Jersey it is held that it is not a good gift without a written assignment. Matthews v. Hoagland, 48 N. J. Eq. 455.

[1113] Fraser v. Charleston, 11 S. C. 486; United States v. Cutts, 1 Sumner, 133.

[1114] Sewall v. Boston Water Power Co., 4 Allen, 277; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616.

The assignment need not be under seal [1115] unless the by-laws provide otherwise.[1116]

b. Transfer without registration.

The first sentence of the section "was plainly not declarative of the meaning of former acts, but the establishment of a new rule showing a change of legislative intention." [1117] It was, however, declarative of a usage among brokers,[1118] which the court considered well founded.[1119] As this provision occurs in the Revised Laws, it is doubtful whether it applies to stock of foreign corporations.[1120]

Under the original wording of this sentence of the section, the written power of attorney was to be signed by the "owner of the certificate;" and, under this wording, it was held that the signature of a guardian, whose trust relation to the property was disclosed on the face of the paper, was not sufficient to make the statute apply,[1121] although the statute was plainly not intended to affect the power of an executor or a trustee to sell and convey property.[1122] In the Revised Laws, the wording was altered so that if the signature upon the back corresponded with that upon the face the statute applied.

Where one is under an implied promise to deliver a certain number of shares, and does deliver a certificate with a power of attorney signed in blank, the person receiving the certificate is a "purchaser," [1123] and such a power of attorney is a "written

[1115] Quiner v. Marblehead Ins. Co., 10 Mass. 476; Atkinson v. Atkinson, 8 Allen, 15, 19.

[1116] Bishop v. Globe Co., 135 Mass. 132.

[1117] Central Nat. Bank v. Williston, 138 Mass. 244, 247, per W. Allen, J.; Andrews v. Worcester, etc., Railroad, 159 Mass. 66, 33 N. E. Rep. 1109; Clews v. Friedman, 182 Mass. 555.

[1118] Russell v. American Bell Telephone Co., 180 Mass. 467, 62 N. E. Rep. 751; Clews v. Friedman, 182 Mass. 555. Cf. Wright Lumber Co. v. Hixon, 105 Wis. 153, 158.

[1119] Andrews v. Worcester, etc., R. Co., 159 Mass. 64, 66, 33 N. E. Rep. 1109.

[1120] Jones v. Atchison, etc., R. R., 150 Mass. 304, 308, 23 N. E. Rep. 43.

[1121] O'Herron v. Gray, 168 Mass. 573, 576, 47 N. E. Rep. 429.

[1122] Jones v. Atchison, etc., R. R., 150 Mass. 304, 308, 23 N. E. Rep. 43.

[1123] Andrews v. Worcester, etc., R. R., 159 Mass. 66, 67, 33 N. E. Rep. 1109. See Taft v. Church, 162 Mass. 527, 532.

power of attorney" within the meaning of this provision.[1124] But a letter from a pledgee to the corporation stating that he holds a certificate and requesting a transfer, together with a memorandum by the clerk of the corporation, on the stub of the certificate, to the same effect, and referring to the letter, is not a good written transfer under the statute.[1125]

It would seem that one who intrusts to a broker a certificate signed in blank on the back, for the purpose of having it exchanged for a new certificate, cannot assert his title as against a *bona fide* pledgee to whom the broker has fraudulently pledged the certificate.[1126]

Query, what remedy, if any, a creditor has, who has attached shares of the corporation belonging to his debtor, to prevent a transfer by delivery under this section.[1127]

This section has no effect to make a broker who is a pledgee of stocks the owner thereof for the purposes of taxation.[1127a]

c. Transfer with registration.[1128]

Where a statute or the charter of a corporation prescribes any formalities for the transfer of shares, they must be complied with. Thus, if a seal be required on transfers by virtue of a statute requiring transfers to be made on the books in such form as the by-laws shall prescribe, and the by-laws require assignments to be on the back of the certificates and to be under seal, it is held that the word "seal" in brackets on an assignment is not sufficient to make a good transfer.[1129] And, where transfers were to be in the presence of witnesses, it was held the witnesses should attest the signature of the holder.[1130]

If all formalities have, in fact, been complied with, a corpo-

[1124] Ibid.

[1125] Newell v. Williston, 138 Mass. 240.

[1126] Russell v. Am. Bell Telephone Co., 180 Mass. 467, 62 N. E. Rep. 751; Gurley v. Reed, 190 Mass. 512.

[1127] Clews v. Friedman, 182 Mass. 555.

[1127a] Chase v. Boston, 193 Mass. 522.

[1128] As to by-laws regulating stock transfer, see supra, § 13, *d*.

[1129] Bishop v. Globe Co., 135 Mass. 132.

[1130] Dane v. Young, 61 Me. 160.

ration which refuses a transfer is liable for conversion of the shares.[1131]

Corporations are entitled to recognize as owners those who appear to be stockholders upon their books, and have nothing to do with undisclosed equities or relations.[1132]

d. Duty of the corporation as to transfer — Forged assignments.

The corporation is bound at its peril to discover a forgery of the signature of the owner to an assignment of a certificate, or a power of attorney to transfer it,[1133] and may require proof of the identity of a signature.[1133a]

If it issues a new certificate on the faith of such a forged transfer, the true owner can compel the corporation to issue a certificate to him for his shares, and to pay him the dividends thereon,[1134] if it can do so without overissuing its stock. Often the only way it can do this is by going into the market and purchasing shares.[1135] If it has already issued all its stock and cannot purchase any in the market, the injured party must be content with damages.

The corporation may also be liable when a transfer has been registered to *bona fide* purchasers from the transferee;[1136] for, although the first transferee is not protected, a subsequent purchaser without notice is, and he cannot be compelled to surrender a certificate issued to him.[1137] In such a case, the

[1131] Bond v. Mount Hope Iron Co., 99 Mass. 505.

[1132] J. H. Wentworth Co. v. French, 176 Mass. 442; Barrett v. King, 181 Mass. 476, 478.

[1133] Crocker v. Old Colony R. Co., 137 Mass. 417, 419; Pratt v. Taunton Copper Co., 123 Mass. 110; Pratt v. Boston & Albany R. Co., 126 Mass. 443.

Cf. Sewall v. Boston Water Power Co., 4 Allen, 277, where the assignment was altered so as to convey a greater number of shares. So in Matthews v. Massachusetts Nat. Bank, 1 Holmes, 396.

[1133a] Telegraph Co. v. Davenport, 97 U. S. 369.

[1134] Pratt v. Taunton Copper Co., 123 Mass. 110; Sewall v. Boston Water Power Co., 4 Allen, 277; Machinists' Nat. Bank v. Field, 126 Mass. 345.

[1135] Pratt v. Boston & Albany R. Co., 126 Mass. 443. See supra, § 14, *h*.

[1136] Crocker v. Old Colony R. Co., 137 Mass. 417, 419.

[1137] Machinists' Nat. Bank v. Field, 126 Mass. 345.

corporation may have an action over against the one who presented the forged transfer.[1138]

When there has been no intervening registration, even a *bona fide* purchaser is not entitled to registration, but is put to an action against the one who sold to him;[1139] but an innocent broker or auctioneer through whom the stock passes to the *bona fide* holder is not, however, liable.[1140]

e. — Motive for transfer.

The motive of the proposed transfer is of no concern to the corporation, and it is not its duty to inquire as to the purposes of the parties, or whether the transaction is in good faith or otherwise.[1141]

f. — Particular cases.

(1) Infants.

It is generally said that a subscription for stock by an infant is voidable, though it may be ratified when the infant comes of age, and the same is true of purchases and sales of stock by infants.[1142] In spite of the voidability of a purchase by an infant, the title passes to him if it be for his benefit,[1143] and therefore he is presumably entitled to a transfer upon the books.

(2) Married women.

In this Commonwealth, married women can contract as if they were sole.[1144] They may therefore purchase and sell shares, and are entitled to have them registered in their own names.[1145]

[1138] Boston & Albany R. Co. v. Richardson, 135 Mass. 473.

[1139] Matthews v. Mass. Nat. Bank, 1 Holmes, 396; Boston & Albany R. Co. v. Richardson, 135 Mass. 473.

[1140] Machinists' Nat. Bank v. Field, 126 Mass. 345.

[1141] Crocker v. Old Colony R. Co., 137 Mass. 417.

[1142] 1 Cook on Corp., 5th ed., §§ 250, 318; Lowell on Transfer of Stock, § 16; 3 Clark & Marshall, 1723, 1738, 2448; Smith v. Baker, 42 Hun, 505.

[1143] Lumsden's Case, L. R., 4 Ch. 31.

[1144] R. L., c. 153, § 2.

[1145] Cf. Stanwood v. Stanwood, 17 Mass. 57.

(3) Insane persons.

An assignment by a lunatic is absolutely void, and the corporation is bound to discover the fact of such incapacity.[1146]

(4) Bankrupts.

An assignment made more than four months before an adjudication of bankruptcy passes a good title as against a trustee in bankruptcy, though not registered, as the trustee stands merely in the shoes of the bankrupt.[1147] And the same is true of transfers within four months, unless voidable for fraud.[1148]

(5) Partners.

One partner may sell and assign stock belonging to the partnership,[1149] but he cannot have it transferred into his individual name.[1150]

(6) Executors and administrators.

In this State, an executor or administrator has the power to sell personal property in settling the estate of his decedent, and therefore the corporation is bound only to see that the person making the assignment is in fact properly appointed as executor or administrator and that his signature is genuine. It is not bound to see to the application made of the proceeds.[1151]

The corporation should also in every case examine a copy of the will where there is one, because, if the shares in question have been specifically bequeathed, the executor may have no power to transfer them except to the legatee without a special order of court.[1152] Of course, if the corporation has notice

[1146] Lowell on Transfer of Stock, § 144; Chew v. Bank of Baltimore, 14 Md. 299.

[1147] Dickinson v. Central Nat. Bank, 129 Mass. 279, 283.

[1148] Dickinson v. Central Nat. Bank, 129 Mass. 279, 283. Cf. Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515; Dugan v. Nichols, 125 Mass. 43.

[1149] Quiner v. Marblehead Social Ins. Co., 10 Mass. 476; Sargent v. Franklin Ins. Co., 8 Pick. 90, 97.

[1150] Comstock v. Buchanan, 57 Barb. 127.

[1151] Hutchins v. State Bank, 12 Met. 421.

[1152] In Hutchins v. State Bank, 12 Met. 421, a will provided that stock should not be sold unless the comfort of the widow (who was executrix) required it, but should be apportioned to his relations as she should direct

that an executor or administrator is attempting to transfer for a fraudulent purpose it is its duty to refuse a transfer.[1153]

An executor or administrator may ask for a transfer from the deceased to himself or from the deceased to a purchaser. Query, whether the power to transfer continues where an executor continues to hold the property as such, although he is in fact acting as trustee.[1154]

One executor may sell and transfer stock registered in the name of the testator;[1155] but where stock is registered in the name of two or more executors all must join in the transfer.[1156]

(7) Trustees.

Stock registered in the name of a trustee should state the trust: thus "A. B. trustee for C. D. under the will of E. F." ; or, "A. B. trustee for C. D. under indenture of trust dated January 1, 1906," etc.

When the only description on the certificate is "A. B. trustee," it is ambiguous, and the corporation is liable if it registers a transfer not in accordance with the terms of the particular trust under which the stock is held. And the word "trustee" alone is sufficient to put the corporation upon such inquiry.[1157]

A trustee, unlike an executor, has *prima facie* no power to sell stock or to change investments,[1158] and therefore the corporation should always call for a certified copy of the will or deed of trust, as well as of the trustee's appointment. Where the trustee is acting under an order of court, he should likewise present a copy of the order. The same principle applies where

by will. The court held that the corporation was not bound to take notice of the provisions of the will — a position denied in Stewart v. Firemen's Ins. Co., 53 Md. 564. It seems that the principal case might well be put upon the ground that the executrix was the judge of her own needs and had the power to sell at any time.

[1153] Jones v. Atchison, etc., R. Co., 150 Mass. 304.

[1154] Jones v. Atchison, etc., R. Co., 150 Mass. 304, 307.

[1155] Cook on Corp., § 398.

[1156] Barton v. North Staffordshire R. Co., 38 Ch. D. 458.

[1157] Loring v. Salisbury Mills, 125 Mass. 138, 152; Loring v. Brodie, 134 Mass. 453, 459; Shaw v. Spencer, 100 Mass. 382; Tuttle v. First Nat. Bank, 187 Mass. 533; Marbury v. Ehlen, 72 Md. 206.

[1158] Lowell on Transfer of Stock, § 62.

trustees ask for a transfer to themselves of stock standing in the name of their testator, that is, they must satisfy the corporation that they have authority to receive the stock by virtue of the transfer.[1159] It is therefore customary for corporations to ask for copies of these papers for their files, but they are not entitled to keep them unless the other party consents,[1160] and, in practice, they are frequently entered in a corporation record book and then returned.

Query, whether the power of an executor to transfer continues where he in fact holds the property as trustee.[1161]

Inasmuch as all trustees must act in matters affecting the trust, they should all execute a transfer of stock.[1162] Upon the death of a trustee, a new trustee should be appointed who can then join in the transfer.[1163]

(8) Guardians.

Shares held by persons under guardianship should be registered in their names, and transfers executed by "C. D., guardian of A. B."

At common law, a guardian, like an executor or administrator, had authority *prima facie* to sell and transfer stock belonging to his ward.[1164] Our statutes provide that a guardian may obtain a license to sell from the Probate Court.[1165] Query, whether a guardian may transfer shares without a license.[1166]

(9) Pledgees.

As to the duty of the corporation with respect to transfers by pledgees, see infra, this section, under **h**.[1167]

[1159] Bird v. Chicago, etc., R. Co., 137 Mass. 428.

[1160] Bird v. Chicago, etc., R. Co., 137 Mass. 428.

[1161] Jones v. Atchison, etc., R. Co., 150 Mass. 304, 307.

[1162] Bohlen's Estate, 75 Pa. St. 304; Barton v. London, etc., R. Co., 24 Q. B. D. 77.

[1163] Parker v. Converse, 5 Gray, 336, 341.

[1164] Lamar v. Micou, 112 U. S. 452, 475; Ellis v. Merrimack Bridge, 2 Pick. 243.

[1165] R. L., c. 145, § 35.

[1166] See Crocker, Notes on Rev. Laws, 451; Cook on Corp., § 328; Atkinson v. Atkinson, 8 Allen, 15, 19; O'Herron v. Gray, 168 Mass. 573, 576; Wallace v. Holmes, 9 Blatch. 65.

[1167] As to the personal liability of pledgees, see infra, § 33, *d*.

(10) Attached stock.

One of the most important cases in which a corporation wishes to know its duty in granting or refusing a transfer is where the shares of a stockholder have been attached.

How stock is attached.

"The share or interest of a stockholder in a corporation organized under the laws of this commonwealth or of the United States and located or having a general office in this commonwealth may be attached by leaving an attested copy of the writ without the declaration, and of the return of the attachment with the clerk, treasurer or cashier of the company, if there is such officer; otherwise with any officer or person who has at the time the custody of the books and papers of the corporation." [1168]

The present section of the corporation act provides that the delivery of a certificate with a written transfer or power of attorney operates as a transfer of title as against all persons. Therefore such a delivery defeats attaching creditors, whether their attachments were subsequent to the delivery [1169] or previous to it.[1170]

[1168] R. L., c. 167, § 66; Pub. St., c. 161, § 71; St. 1870, c. 291, § 1; Gen. St., c. 123, § 59; Rev. St., c. 40, § 13; c. 90, § 36; St. 1804, c. 83, §§ 1, 5; St. 1798, c. 59, § 9.

Citations. — St. 1804, c. 83, § 1: Titcomb v. Union, etc., Ins. Co., 8 Mass. 316, 329; Quiner v. Marblehead Ins. Co., 10 Mass. 476; Howe v. Starkweather, 17 Mass. 240, 241; Nesmith v. Washington Bank, 6 Pick. 324, 329; Hussey v. Manufacturers', etc., Bank, 10 Pick. 415, 420; Chase v. Merrimack Bank, 19 Pick. 564; Central National Bank v. Williston, 138 Mass. 246.

St. 1804, c. 83, § 5; Howe v. Starkweather, 17 Mass. 240, 242; Plymouth Bank v. Bank of Norfolk, 10 Pick. 454, 457.

St. 1870, c. 291, § 1: Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515, 517.

Rev. St., c. 90, § 36: Fisher v. Essex Bank, 5 Gray, 380.

Gen. St., c. 123, § 59: Vantine v. Morse, 104 Mass. 277; Boston Music Hall v. Cory, 129 Mass. 435, 436.

Pub. St., c. 161, § 71: Central National Bank v. Williston, 138 Mass. 246; Loomis v. Lewis, 140 Mass. 208; Atwood v. Dumas, 149 Mass. 168.

[1169] Andrews v. Worcester, etc., R. Co., 159 Mass. 64; Clews v. Friedman, 182 Mass. 555.

See Central National Bank v. Williston, 138 Mass. 244; Fitchburg Savings Bank v. Torrey, 134 Mass. 239.

[1170] Clews v. Friedman, 182 Mass. 555.

Historical. The wording of this section is taken largely from St. 1884,

The written transfer must, of course, be sufficient, otherwise the delivery will not be valid as against the attachment.[1171]

Query, whether a creditor who has made an attachment has any remedy, in equity or otherwise, to prevent a transfer of the shares by delivery.[1172]

As to who is a "bona fide purchaser or pledgee for value," see supra, under b.

Executors are chargeable in trustee process by a legatee for shares specifically bequeathed not required for debts; and, when charged, it is their duty to transfer into the legatee's

c. 229. "This enactment was a new departure and a change of policy in the legislation of this Commonwealth. Previously to the St. 1881, c. 302, transfers of the shares of railroad and manufacturing corporations and of many others, could not be made effectual against the rights of subsequent attaching creditors unless recorded on the books of the corporation. Blanchard v. Dedham Gas Light Co., 12 Gray, 213; Fisher v. Essex Bank, 5 Gray, 373; Pub. St., c. 112, § 56. Except in reference to the small number of corporations in which there was no provision of statute or of the charter requiring a transfer to be made on the books of the corporation (see Boston Music Hall Association v. Cory, 129 Mass. 435), a creditor, by examining the books, could be certain to obtain a valid attachment against the owner of record. No purchaser of stock could be sure that his title was good against possible attachments without an examination of the books of the corporation, nor could he be protected against attachments that might be made subsequently, unless he recorded his transfer immediately. This St. 1881, c. 302, . . . left purchasers subject to the rights of creditors whose attachments had been made previously, and it gave every purchaser ten days in which to record his transfer before he could be affected by a subsequent attachment.

"In 1884 purchasers and pledgees sought to obtain greater security and convenience, and the result was the statute now before us. . . . The transfer of the certificate, by virtue of the statute, transfers the title referred to as against all parties, including attaching creditors. The statute declares in effect that an attachment shall be of no effect against a *bona fide* transaction of this kind." Clews v. Friedman, 182 Mass. 555, 557, per Knowlton, C. J. Cf. Russell v. American Bell Telephone Co., 180 Mass. 467; Andrews v. Worcester, etc., R. Co., 159 Mass. 64, 66; Wright Lumber Co. v. Hixon, 105 Wis. 153, 158; Central National Bank v. Williston, 138 Mass. 244.

As to points under early statutes, see Titcomb v. Union, etc., Ins. Co., 8 Mass. 326; Quiner v. Marblehead Ins. Co., 10 Mass. 476; Nesmith v. Washington Bank, 6 Pick. 324; Howe v. Starkweather, 17 Mass. 240; Chase v. Merrimack Bank, 19 Pick. 564; Plymouth Bank v. Bank of Norfolk, 10 Pick. 454; Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515.

[1171] See supra, under *b*.

[1172] Clews v. Friedman, 182 Mass. 555, 558.

name, so that the shares can be taken upon execution.[1173] And where stock is pledged as collateral, the pledgee can be trusteed for the excess of the value of the stock when sold over the amount of the debt;[1174] but if the debt has been paid and the certificate redelivered the pledgee is not chargeable.[1175]

"A share or interest so attached, with all the dividends accruing thereon, shall, except as otherwise provided in [§ 28 of the present corporation act], be held as security to satisfy the final judgment in the action, in like manner as other personal property is held." [1176]

"If the officer who has a writ of attachment against such stockholder exhibits the writ to the officer of the company who is appointed to keep a record or account of the shares or interest of the stockholders therein, and requests a certificate of the number of shares or amount of the interest held by the defendant, such officer of the company shall give such certificate to the officer who holds the writ. If he unreasonably refuses so to do, or if he wilfully gives a false certificate thereof he shall be liable in an action of tort for double the amount of the damages caused by such refusal or false certificate, unless the judgment is satisfied by the original defendant." [1177]

"If an attachment or seizure on execution is made of a share in an incorporated company or of any other property which may be attached without taking and keeping the exclusive possession thereof, and if the same property is subsequently attached or taken

[1173] Vantine v. Morse, 104 Mass. 277.

[1174] New England Marine Ins. Co. v. Chandler, 16 Mass. 275.

[1175] Cooke v. Hallett, 119 Mass. 148.

[1176] R. L., c. 167, § 67; Pub. St., c. 161, § 72; St. 1870, c. 291, § 1; Gen. St., c. 123, § 60; Rev. St., c. 90, § 37; St. 1804, c. 83, § 2.

Citations. — St. 1804, c. 83, § 2: Titcomb v. Union Fire Ins. Co., 8 Mass. 329.

St. 1870, c. 291, § 1: Sibley v. Quinsigamond Bank, 133 Mass. 517.

Gen. St., c. 123, § 60: Boston Music Hall v. Cory, 129 Mass. 436.

Pub. St., c. 161, § 72: Central Nat. Bank v. Williston, 138 Mass. 246; Loomis v. Lewis, 140 Mass. 208; Atwood v. Dumas, 149 Mass. 168; Russia Cement Co. v. Le Page Co., 174 Mass. 352.

The clause in brackets originally referred to R. L., c. 109, § 36, repealed by the present act and by St. 1903, c. 423.

[1177] R. L., c. 167, § 68; Pub. St., c. 161, § 73; Gen. St., c. 123, § 61; Rev. St., c. 90, § 38.

Citations. — Rev. St., c. 90, § 38: Sibley v. Quinsigamond Bank, 133 Mass. 521.

Gen. St., c. 123, § 61: Boston Music Hall v. Cory, 129 Mass. 436.

Pub. St., c. 161, § 73: Central Nat. Bank v. Williston, 138 Mass. 246; Loomis v. Lewis, 140 Mass. 208; Atwood v. Dumas, 149 Mass. 168; Russia Cement Co. v. Le Page Co., 174 Mass. 352.

on execution by another officer, he shall give notice thereof to the officer who makes the sale under the first attachment or seizure; and if the latter, before he receives such notice, pays to the debtor the balance of the proceeds of the sale, he shall not be liable to the person who claims under such subsequent attachment or seizure." [1178]

As to the provisions respecting levy on corporate shares, see R. L., c. 177, §§ 46–51. At common law a sale of shares on execution was not justified, as they are not chattels, and therefore the statute provisions must have been fully complied with to authorize the corporation in issuing a new certificate to the purchaser at the execution sale.[1179] The statute relating to sales on execution does not define what "interest" of a stockholder is attachable, but leaves that to be determined by the common law or by some other statute.[1180]

Shares of stock may also be sold for non-payment of taxes,[1181] but not after the death of the stockholder.[1181a] Unless the procedure mentioned in the statute is strictly followed, no title passes to the purchaser.[1182] In such a case, if the proceedings appear to be regular on their face, the corporation is authorized, if not indeed required, to issue a new certificate to the purchaser at the execution sale.[1183]

(11) Partly paid stock.

The statute provides that no stock on which instalments are overdue and unpaid shall be transferred, except to a purchaser

[1178] R. L., c. 177, § 45; Pub. St., c. 171, § 44; Gen. St., c. 133, § 42; Rev. St., c. 97, § 31; St. 1819, c. 87; St. 1804, c. 83, § 6.

Citations. — St. 1804, c. 83, § 6: Watson v. Todd, 5 Mass. 271; Kelly v. Beers, 12 Mass. 390; Vinton v. Bradford, 13 Mass. 115; Rich v. Bell, 16 Mass. 296; Denny v. Hamilton, 16 Mass. 402; Bigelow v. Willson, 1 Pick. 488; Clark v. Austin, 2 Pick. 530; Bacon v. Leonard, 4 Pick. 281; Wheeler v. Willard, 14 Pick. 489.

St. 1819, c. 87: Denny v. Hamilton, 16 Mass. 404.

Pub. St., c. 171, § 44: Central Nat. Bank v. Williston, 138 Mass. 246.

[1179] Howe v. Starkweather, 17 Mass. 240, 244; Sibley v. Quinsigamond Bank, 133 Mass. 515, 517.

[1180] Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515, 518, citing Boston Music Hall v. Cory, 129 Mass. 435.

[1181] R. L., c. 13, §§ 20, 23.

[1181a] Wilson v. Shearer, 9 Met. 504, 506.

[1182] Noyes v. Haverhill, 11 Cush. 338.

[1183] Smith v. Northampton Bank, 4 Cush. 1, 10.

at a sale for non-payment of instalments, or, in certain cases, to the delinquent stockholder or the original subscriber upon the payment of instalments, interest and incidental charges.[1184]

(12) Stock on which the corporation has a lien.

At common law a corporation has no lien upon the shares of a stockholder for debts due it from him.[1185] A lien may, however, be expressly given by charter or by statute, and in such a case all persons have notice of it, and the corporation may enforce it as against even *bona fide* purchasers and pledgees without notice.[1186] And if a lien is given by charter or law to a foreign corporation, it will be enforced in this Commonwealth.[1187]

A corporation may, of course, waive its lien, or estop itself from asserting it; but it is not estopped by the promise of the person in charge of the transfer book to make a transfer.[1188]

It seems that a lien may be given by a provision in the articles of association,[1189] and, by the better opinion it may be created by a by-law, even though not expressly authorized by statute or charter.[1190]

[1184] St. 1903, c. 437, §§ 16, 28.

As to the early law, see Quiner v. Marblehead Ins. Co., 10 Mass. 476; Nesmith v. Washington Bank, 17 Mass. 240, 241.

[1185] Merrill v. Cape Ann Granite Co., 161 Mass. 212, 218; Sargent v. Franklin Ins. Co., 8 Pick. 90; Mass. Iron Co. v. Hooper, 7 Cush. 183; Case v. Citizens' Bank, 100 U. S. 446; Driscoll v. West, etc., Manuf. Co., 59 N. Y. 96.

[1186] Union Bank v. Laird, 2 Wheat. 390; Bishop v. Globe Co., 135 Mass. 132; First Nat. Bank v. Hartford Life, etc., Ins. Co., 45 Conn. 22. In Ripley v. Sampson, 10 Pick. 371, 373, it was held that a statute authorizing the corporation to sell shares for non-payment of an assessment gave it a lien.

[1187] Bishop v. Globe Co., 135 Mass. 132; Hammond v. Hastings, 134 U. S. 401.

[1188] Bishop v. Globe Co., 135 Mass. 132.

[1189] Leggett v. Bank of Sing Sing, 24 N. Y. 283; Arnold v. Suffolk Bank, 27 Barb. 424.

[1190] Brent v. Bank of Washington, 10 Pet. 616; Vansands v. Middlesex County Bank, 26 Conn. 144; Bronson Electric Co. v. Rheubottom, 122 Mich. 608; Young v. Vough, 23 N. J. Eq. 325. The question was not decided in Plymouth Bank v. Bank of Norfolk, 10 Pick. 454, 459; Nesmith v. Washington Bank, 6 Pick. 324.

Inasmuch as the public are not required to take notice of by-laws,[1191] such a by-law should be printed on the certificates.

The declaration of a dividend severs it entirely from the stock, and it becomes a debt to the stockholders; therefore, even where a corporation has no lien on the shares, it may set off a dividend against the debt of a stockholder.[1192]

(13) Stock liable to legacy and succession tax.

Corporations should not make transfers of stock for estates of deceased non-residents, without ascertaining whether such estates are liable to a legacy and succession tax; for, if they make such transfers the following sections of statute apply:

"If a foreign executor, administrator or trustee assigns or transfers any stock in any national bank located in this commonwealth or in any corporation organized under the laws of this commonwealth, owned by a deceased non-resident at the date of his death and liable to a tax under the provisions of this act, the tax shall be paid to the treasurer and receiver general at the time of such assignment or transfer; and if it is not paid when due, such executor, administrator or trustee shall be personally liable therefor until it is paid. A bank located in this commonwealth or a corporation organized under the laws of this commonwealth which shall record a transfer of any share of its stock made by a foreign executor, administrator or trustee, or issue a new certificate for a share of its stock at the instance of a foreign executor, administrator or trustee, before all taxes imposed thereon by the provisions of this act have been paid, shall be liable for such tax in an action of contract brought by the treasurer and receiver general." [1193]

The fact that shares in Massachusetts corporations owned by a non-resident at his death, the certificates of which are in another State, are transferred by his executor under appointment in that State before he is appointed here, does not exempt the shares from taxation.[1194] "Persons claiming a succession to property in this Commonwealth under non-resident owners must hold their right subject to the prior right of the Common-

[1191] See supra, § 13.

[1192] Merrill v. Cape Ann Granite Co., 161 Mass. 212, 218; Sargent v. Franklin Ins. Co., 8 Pick. 90, 100.

[1193] St. 1907, c. 563, § 15; R. L., c. 15, § 12; St. 1900, c. 371, § 1.

[1194] Greves v. Shaw, 173 Mass. 205. See also Callahan v. Woodbridge, 171 Mass. 595; Frothingham v. Shaw, 175 Mass. 59.

wealth to have the property administered here, in order that taxes may be paid upon the succession." [1195]

"Securities or assets belonging to the estate of a deceased non-resident shall not be delivered or transferred to a foreign executor, administrator or legal representative of said decedent, unless such executor, administrator or legal representative has been licensed to receive such securities or assets under the provisions of section three of chapter one hundred and forty-eight of the Revised Laws, without serving notice upon the tax commissioner of the time and place of such intended delivery or transfer, seven days at least before the time of such delivery or transfer, but the notice required by section three of said chapter one hundred and forty-eight to be given to the treasurer and receiver general shall be given to the tax commissioner in regard to all property subject to the provisions of this act, instead of being given to the treasurer and receiver general. The tax commissioner, either personally or by representative, may examine such securities or assets at the time of such delivery or transfer. Failure to serve such notice or to allow such examination shall render the person or corporation making the delivery or transfer liable, in an action of contract brought by the treasurer and receiver general, to the payment of the tax due upon said securities or assets." [1196]

g. — Surrender of old certificate.

As we have seen,[1197] a corporation which issues a certificate may be estopped to deny its validity in the hands of *bona fide* purchasers; and, if it issues a certificate without requiring the surrender of the old certificate, it may be liable on both certificates. Therefore the corporation is not required to issue a new certificate unless the old one is surrendered or is proved to have been lost or destroyed.[1198] And this principle may be incorporated in a by-law.[1199]

If, however, a corporation refuses to make a transfer upon another ground, it cannot afterwards defend itself upon the ground that the old certificate was not surrendered, where the one asking the transfer had it with him.[1200]

[1195] Greves v. Shaw, 173 Mass. 205, 210, per Knowlton, J.

[1196] St. 1907, c. 563, § 16; R. L., c. 15, § 13; St. 1900, c. 371, § 2.

[1197] § 14, *h*, *i*.

[1198] Bean v. American Loan & Trust Co., 122 N. Y. 622; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616.

[1199] State v. New Orleans, etc., R. Co., 30 La. Ann. 308.

[1200] Bond v. Mount Hope Iron Co., 99 Mass. 505.

h. Transfer as collateral security.[1201]

The right to vote.

The provisions of the section on this subject may have been originally suggested by the case of Crease v. Babcock,[1202] holding that the corporation must go by the certificate in determining the right to vote.[1203] "The statute in a different way reaches the result which equity reached by compelling the pledgee to give a proxy."[1204]

Pledgee's right to certificate.

The statute expressly provides that a pledgee shall be entitled to take out a certificate in his own name, and this would be true apart from the statute.[1205]

Pledge in equity.

"The obvious purpose of this section is to enable the pledgee to hold the security without being liable for the debts of the corporation or to taxation for the property; and if it were to be construed as excluding all other methods of conveying stock as collateral security, it would exclude evidence of a separate defeasance in writing. It is not framed with a view to that question, but altogether *alio intuitu*.[1206] A pledge may, therefore, be established in equity independently of this provision upon extrinsic evidence that the transfer, though absolute in its terms, was really intended as collateral security.[1207]

Definition of "pledgor."

By "pledgor" the statute plainly means the general owner at the date when the certificate is issued.[1208] Therefore a cer-

[1201] As to the personal liability of pledgees, see infra, § 33, *d*.

[1202] 10 Met. 525, 526.

[1203] J. H. Wentworth Co. v. French, 176 Mass. 442, 57 N. E. Rep. 789.

[1204] Ibid., p. 443, per Holmes, C. J.

[1205] Day v. Holmes, 103 Mass. 306, 310; Fitchburg Savings Bank v. Torrey, 134 Mass. 239, 242.

[1206] Newton v. Fay, 10 Allen, 505, 506, per Chapman, J.

[1207] Newton v. Fay, 10 Allen, 505.

[1208] J. H. Wentworth Co. v. French, 176 Mass. 442, 444, 57 N. E. Rep. 789.

tificate standing in the name of X, stating that it is held as collateral for the note of A, and issued after A has sold all his rights to B, does not satisfy the statute, and X is the stockholder.[1209]

Corporation as pledgee.

Under the general principle of the provisions of this section, a corporation cannot be taxed on stock of another corporation pledged to it as collateral.[1210]

Where a stockholder transferred his shares to the corporation by a writing absolute in form, but in fact as collateral for a note, it was held, under the prior law, that, while paying interest and receiving dividends, he continued to be a member.[1211]

Right of pledgee to sell.

A pledgee of stock may, after default in payment or performance, give written notice to the pledgor of his intention to sell the stock by leaving a copy with the pledgor or by publishing once a week for three weeks, and may then record the notice, together with an affidavit of service, in the office of the clerk of the city or town in which he, the pledgee, resides.[1212] If performance or tender is not made within sixty days after such record, the pledgee may sell the stock at public auction.[1213]

A pledgee cannot, however, sell in this way if there is anything in the contract of pledge to the contrary,[1214] and if he sells, pledges, lends or disposes of the stock before the debt becomes due or payable, he is criminally liable.[1215]

The foregoing provisions do not limit the right of a pledgee to dispose of stock in any other manner allowed by the contract or by-law,[1216] and if he is allowed by the contract to sell

[1209] Ibid.
[1210] Waltham Bank v. Waltham, 10 Met. 340.
[1211] Merchants' Bank v. Cook, 4 Pick. 405.
[1212] R. L., c. 198, §§ 8, 5, 6.
[1213] R. L., c. 198, § 9.
[1214] R. L., c. 198, § 10.
[1215] R. L., c. 208, § 71.
[1216] R. L., c. 198, § 10; Taft v. Church, 162 Mass. 527, 533. See Fay v. Gray, 142 Mass. 344.

on a certain contingency, he may before breach contract with a third person to sell to him upon the happening of the contingency.[1217]

Liability of pledgee to tax.

The fact that stock is pledged with a broker to secure margins does not alter the ownership, or make the broker liable to be taxed upon the stock; and section 28 of the act does not affect the matter.[1217a]

Wrongful pledge.

If one endorses a certificate in blank and entrusts it to another, permitting him to have the stock transferred to himself and to take out a certificate in his name for the purpose of pledging the stock for the benefit of the owner, and the person thus entrusted wrongfully pledges the stock for his own benefit, the pledgee, acting in good faith, is entitled to hold the stock for the full amount of the debt, and the owner's only remedy in equity is to redeem from the pledgee.[1218]

Mortgage of stock.

"The ordinary distinction between a mortgage and a pledge is, that by the former the general property passes, while by the latter it does not, but merely a special property passes."[1219] Mortgages of stock are uncommon except as collateral trust mortgages to secure issues of bonds and the like.

i. Criminal provisions.

The following criminal provisions apply to transfer of stock:[1220]

"An officer, agent, clerk or servant of a corporation, or any other person, who fraudulently issues or transfers a certificate of the stock of a corporation to a person who is not entitled thereto, or who

[1217] Taft v. Church, 162 Mass. 527.

[1217a] Chase v. Boston, 193 Mass. 522.

[1218] Gurley v. Reed, 190 Mass. 512; Russell v. Am. Bell Telephone Co., 180 Mass. 467, 62 N. E. Rep. 751.

[1219] Newton v. Fay, 10 Allen, 505, 506, per Chapman, J.

[1220] As to provisions respecting issue, see supra, § 14, *i*.

fraudulently signs such a certificate, in blank or otherwise, with the intent that it shall be so issued or transferred by himself or any other person, shall be punished by imprisonment in the state prison for not more than ten years or in the house of correction for not more than one year." [1221]

"An officer of a corporation, or an agent, clerk or servant of a person, firm or corporation, who makes a false entry or omits to make a true entry in any book of such person, firm or corpration, with intent to defraud, and any person whose duty it is to make a record or entry of the transfer of stock, or of the issuing or cancelling of certificates thereof or of the amount of stock issued by a corporation, in any book thereof, who, with intent to defraud, omits to make a true record or entry thereof, shall be punished by imprisonment in the state prison for not more than ten years or in the house of correction for not more than one year." [1222]

This section covers entries for the purpose of making a showing at the end of a quarter for the purpose of inducing the declaration of dividends, as such dividends not earned are themselves frauds.[1223] It also covers entries on the stubs of check books by the clerk of a corporation.[1224]

§ 29. Voting rights of fiduciary stockholders.

"Executors, administrators, guardians, trustees or persons in any other representative or fiduciary capacity may vote as stockholders upon stock held in such capacity." [1225]

Query, whether assignees in insolvency and trustees in bankruptcy can vote under this section. In regard to the former the court has said: "Whatever valuable interest there was in the shares they held for the creditors. We think, therefore, that they were bound to attend to the interest of the creditors,

[1221] R. L., c. 208, § 57; Pub. St., c. 203, § 55; Gen. St., c. 161, § 50; St. 1856, c. 123, § 2.

[1222] R. L., c. 208, § 58; St. 1885, c. 223; Pub. St., c. 203, § 56; Gen. St. c. 161, § 51; St. 1856, c. 123, § 3. Cited in Com. v. Dewhirst, 190 Mass. 293.

[1223] Com. v. Dewhirst, 190 Mass. 293.

[1224] Com. v. Dewhirst, 190 Mass. 293. See also this case as to the form of indictment.

[1225] St. 1903, c. 437, § 29. Cf. R. L., c. 109, § 17; Pub. St., c. 105, § 13; Gen. St., c. 68, § 11; St. 1838, c. 98, § 2; Rev. St., c. 38, § 35; St. 1829, c. 53, § 12.

See, generally, Gray v. Coffin, 9 Cush. 192; American Railway-Frog Co. v. Haven, 101 Mass. 398.

and to attend meetings, if such interest required it." [1226] On the other hand, it has been held that a bankrupt may vote although the title has passed to his trustee.[1227]

A conservator would seem to be included within the provision, and is expressly mentioned in the Revised Laws.[1228]

Shares of stock held in trust for the benefit of the corporation cannot, however, be voted.[1229]

§ 30. Stock books and corporate records.

"The agreement of association, an attested copy of the articles of organization or of articles in amendment of said agreement or of said articles and of the by-laws, with a reference on the margin of the copy of the by-laws to all amendments thereof, and a true record of all meetings of stockholders shall be kept by every corporation at its principal office in this commonwealth for the inspection of its stockholders. The stock and transfer books of every corporation, which shall contain a complete list of all stockholders, their residences and the amount of stock held by each, shall be kept at an office of the corporation in this commonwealth for the inspection of its stockholders. Said stock and transfer books and said attested copies and records shall be competent evidence in any court of this commonwealth. If any officer or agent of a corporation having charge of such copies, books or records refuses or neglects to exhibit them or to submit them to examination as aforesaid, he or the corporation shall be liable to any stockholder for all actual damages sustained by reason of such refusal or neglect, and the supreme judicial court or the superior court shall have jurisdiction in equity, upon petition of a stockholder, to order any or all of said copies, books or records to be exhibited to him and to such other stockholders as may become parties to said petition, at such a place and time as may be designated in the order." [1230]

[1226] Gray v. Coffin, 9 Cush. 192, 207, per Shaw, C. J.

[1227] State v. Ferris, 42 Conn. 560.

[1228] R. L., c. 109, § 17. As to Conservators, see R. L., c. 145, §§ 40, 41.

[1229] American Railway-Frog Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377. Cf. 1 Cook, 5th ed., § 613; Com. v. Boston & Albany R. Co., 142 Mass. 146, 7 N. E. Rep. 716; New England Insurance Co. v. Phillips, 141 Mass. 535, 6 N. E. Rep. 534, and supra, § 23. As to the effect of voting such stock, see Ex parte Desdoity, 1 Wend. 98; Market St. Ry. Co. v. Hellman, 109 Cal. 571.

[1230] St. 1903, c. 437, § 30; R. L., c. 109, §§ 32–35; Pub. St., c. 105, § 21;

Maine requires the records and a list of the stockholders to be kept within the State. New Jersey requires the transfer and stock books. In Delaware, duplicate stock and transfer books must be kept within the State. New York requires stock books, while West Virginia does not require any books, to be kept within the State.

It is sometimes held that, apart from statute, there is a duty upon corporations to keep their books and records in the chartering State.[1281]

a. Generally.

The stock books consist of the certificate books containing the certificates and stubs, the transfer book and the stock ledger.

The certificate book contains a record on the stub of each certificate of the number of the certificate, number of shares, date of issue, name and address of the person to whom issued, and, if issued upon surrender of an old certificate, the number of the latter; also a space for the receipt of the person taking away the new certificate. Old certificates are usually cancelled by punching, and pasted onto their respective stubs.

The transfer book contains a copy of the assignment on the back of each certificate with a memorandum of the numbers of new certificates issued as a result of the transfer, and to the pages of the stock ledger devoted to the accounts of the trans-

Gen. St., c. 68, § 10; St. 1858, c. 144; Pub. St., c. 105, § 22; St. 1864, c. 201, § 1; St. 1861, c. 120; Gen. St., c. 68, § 20; St. 1859, c. 227; St. 1889, c. 222, § 3; Pub. St., c. 105, § 23; Gen. St., c. 68, § 12; St. 1847, c. 107.

Citations. — St. 1903, c. 437, § 30; Varney v. Baker, 194 Mass. 239; Gen. St., c. 68, § 10: Boston Music Hall v. Cory, 129 Mass. 436.

St. 1861, c. 120: Central Nat. Bank v. Worcester Horse R. R. Co., 13 Allen, 107.

Gen. St., c. 68, § 20: Com. v. Hamilton Mfg. Co., 12 Allen, 309.

Gen. St., c. 68, § 12: Boston Music Hall v. Cory, 129 Mass. 436.

See also 1 Op. Atty.-Gen. 278, as to the right of the public to see the tax returns of corporations. As to the laws of other States requiring books to be kept within the State, see supra, chap. II, E.

[1281] See State v. Milwaukee, Lake Shore & Western Ry. Co., 45 Wis. 579; 3 Wood on Railroads, p. 2085; Mor. Corp., 2d ed., § 361. Cf. Merrick v. Van Santvoord, 34 N. Y. 207; Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. Rep. 274.

feror and transferee. Many small corporations dispense entirely with the transfer book, and the certificates contain on their backs only a direct assignment to the transferee, without any power of attorney to transfer on the books of the company. This method is simpler and has much to commend it.

The stock ledger contains a record on the debit side, of persons to whom the stockholder has transferred shares, the numbers of his old certificates, the numbers of new certificates issued to them, with the dates and numbers of shares. On the other side appear the names of persons from whom he has received shares, with the dates, certificate numbers, numbers of shares, and, unless all the stock has been fully paid, a statement as to the condition of the shares in that respect.

b. Right to inspect the books.

The right to inspect the corporation books and records at proper times and for proper purposes is incidental to the ownership of shares.[1232] And where the right exists the motive for making the inspection is immaterial, except as hereinafter stated.[1233]

"Nothing more is required than that, acting in good faith for the protection of the interests of the corporation, and his own interests, he desires to ascertain the condition of the company's business."[1234]

"Of course the right at common law is not absolute, so that it can be exercised for mere curiosity, or for merely speculative purposes, or vexatiously. If the court is appealed to for the

[1232] Guthrie v. Harkness, 199 U. S. 148; Re Steinway, 159 N. Y. 250; Commonwealth v. Phœnix Iron Co., 105 Pa. St. 111; Lyon v. American Screw Co., 16 R. I. 472; Phœnix Iron Co. v. Commonwealth, 113 Pa. St. 563; O'Hara v. National Biscuit Co., 69 N. J. L. 198, 54 Atl. 241; Rosenfeld v. Einstein, 46 N. J. L. 479; Fuller v. Alex. Hollander Co., 61 N. J. Eq. 648; Bruning v. Hoboken, etc., Co., 67 N. J. L. 119; Hemingway v. Hemingway, 58 Conn. 443. See also Union Bank v. Knapp, 3 Pick. 96, 108.

[1233] Foster v. White, 86 Ala. 467; Lyon v. American Screw Co., 16 R. I. 472; Mutter v. Eastern, etc., R. Co., 38 Ch. D. 92; Mitchell v. Rubber Reclaiming Co., 24 Atl. 407 (N. J. Ch.); Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189; Weinhenmayer v. Bitner, 88 Md. 325.

[1234] Varney v. Baker, 194 Mass. 239, per Knowlton, C. J.

enforcement of the right, a sound discretion will be exercised to determine whether the petitioner is acting for an honest purpose, not adverse to the interests of the corporation. The court will consider whether his desire for an examination is reasonable, having reference to the interests of the corporation and his personal interests as a member of it. Its effect upon the corporation in reference to competition and other interests will not be disregarded." [1235]

c. – Inspection, how made.

The inspection may be made by an attorney or expert.[1236]

The right of inspection includes the right to make copies,[1237] and a stenographer may be employed.[1238]

d. — Remedy for refusal.

The present act gives a mandatory jurisdiction in equity to compel the production of the books and records therein mentioned.[1239]

Apart from this provision of the statute, and in cases not covered by it, mandamus will lie to compel officers of the corporation to permit inspection in a proper case.[1240]

[1235] Varney v. Baker, 194 Mass. 239, per Knowleton, J.; Bruning v. Hoboken, etc., Co., 67 N. J. L. 119; People v. Northern Pacific R. Co., 50 N. Y. Super. 456; Phœnix Iron Co. v. Commonwealth, 113 Pa. St. 563; Commonwealth v. Phœnix Iron Co., 105 Pa. St. 111; People v. Lake Shore, etc., R. Co., 70 N. Y. 220. See reporter's note to Stettauer v. New York, etc., Construction Co., 42 N. J. Eq. 46, 49.

[1236] Ellsworth v. Dorwart, 95 Iowa, 108; Mitchell v. Rubber Reclaiming Co., 24 Atl. 407 (N. J. Ch.); Foster v. White, 86 Ala. 467; People v. Nassau Ferry Co., 86 Hun, 128.

[1237] Mutter v. Eastern, etc., R. Co., 38 Ch. D. 92; Re Martin, 62 Hun, 557; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189.

[1238] Ellsworth v. Dorwart, 95 Iowa, 108.

[1239] See Huylar v. Cragin Cattle Co., 42 N. J. Eq. 139, 141.

[1240] Varney v. Baker, 194 Mass. 239; Rosenfeld v. Einstein, 46 N. J. L. 479; Bruning v. Hoboken, etc., Co., 67 N. J. L. 119; Fuller v. Alex. Hollander Co., 61 N. J. Eq. 648; People v. Goldstein, 37 N. Y. App. Div. 550, 56 N. Y. S. 306. Cf. Lyon v. American Screw Co., 16 R. I. 472, 475; State v. Pacific Brewing, etc., Co., 21 Wash. 451. See Huylar v. Cragin Cattle Co., 42 N. J. Eq. 139, 141.

e. Records as evidence.

The records of the corporation are evidence of the acts and contracts of the corporation and the authority of agents.[1241]

They may also contain admissions good against the corporation.[1242] "We have no doubt that the books and records of a corporation are *prima facie* evidence against it, as admissions; and, under some circumstances, may be conclusive evidence. But, at the most, a corporation can only be bound conclusively by its records, either when they are the records duly made by the recording officer of its proceedings, or when some person, who has had proper access to them, or knowledge of them, has become aware of their contents, and has acted upon the faith that they were the records of its proceedings. And a corporation is not bound, as to third persons, by interpolations fraudulently inserted in its records, where such third persons have not acted on, or seen, or known of the existence of, the matter so interpolated and appearing to be recorded. It is not estopped or bound by such fraudulent addition, unless it is shown to have been negligent in omitting to make due correction of the records and that some innocent person has been misled thereby." [1243]

Circulars issued by the corporation may also be evidence against it.[1244]

It must appear, of course, that books offered as evidence are the records of the corporation, and that entries therein were made by the proper officers as records.[1245] The entries may be written up after the meeting, and by another person under the direction of the clerk.[1246]

[1241] 2 Cook on Corp., 5th ed., § 714.

[1242] Clark v. Warwick Cycle Co., 174 Mass. 434 (vote to go into insolvency and schedule of creditors, to show plaintiff a creditor).

[1243] Holden v. Hoyt, 134 Mass. 181, 184, per C. Allen, J. Cf. Amherst Bank v. Root, 2 Root, 2 Met. 522, 544; Holden v. Phelps, 141 Mass. 456; Commonwealth v. Reading Savings Bank, 137 Mass. 431, 438.

[1244] Putnam v. Gunning, 162 Mass. 552. Cf. Nash v. Minnesota, etc., Trust Co., 159 Mass. 437.

[1245] Whitman v. Granite Church, 24 Me. 236.

[1246] Wells v. Rahway White Rubber Co., 19 N. J. Eq. 402.

Third persons are not chargeable with notice of the matters recorded in the books of a corporation.[1247]

Where the records are out of the jurisdiction, and are not produced, other evidence may be resorted to for the purpose of establishing corporate acts and the authority of corporate officers,[1248] and the same is true in case of a refusal or failure to produce after notice.[1248a]

A conveyance of assets and "all evidence thereof" passes title and right of possession to account and record books; but, if the corporation needed them for evidence in another matter, the courts would assist in compelling their production.[1249]

The clerk of a corporation may make copies of his records, and his certification will be evidence of the verity of a copy;[1250] but it is no part of his duty to certify to facts not appearing in the records, e. g., as to a certain person being a member of the corporation.[1251]

"Upon the trial of a person [for making an unauthorized issue of stocks, bonds, etc., or fraudulently transferring stock, or making false entries in corporate records, R. L., c. 208, §§ 56-58] the books of any person, firm or corporation to which he had access or the right of access shall be admissible in evidence." [1252]

§ 31. Lost certificates.

"The directors of a corporation may, unless otherwise provided by the by-laws, determine the conditions upon which a new certificate of stock may be issued in place of any certificate which is alleged to have been lost or destroyed. They may, in their discretion, require the owner of a lost or destroyed certificate, or his

[1247] Wetherbee v. Baker, 35 N. J. Eq. 501, 509. See Black v. Shreve, 13 N. J. Eq. 455, 466, 483; North River Meadow Co. v. Christ Church, 22 N. J. L. 424; Van Hook v. Summerville Manuf. Co., 5 N. J. Eq. 137.

[1248] Topping v. Bickford, 4 Allen, 120.

[1248a] Thayer v. Middlesex, etc., Ins. Co., 10 Pick. 326, 329.

[1249] Lothrop Pub. Co. v. Williams, 191 Mass. 361.

[1250] Oakes v. Hill, 14 Pick. 442.

[1251] Oakes v. Hill, 14 Pick. 442. Cf. Hallowell, etc., Bank v. Hamlin, 14 Mass. 178; Hastings v. Blue Hill Turnpike, 9 Pick. 80; Stebbins v. Merritt, 10 Cush. 27.

[1252] R. L., c. 208, § 59; Pub. St., c. 203, § 57; Gen. St., c. 161, § 52; St. 1856, c. 123, § 4.

legal representative, to give a bond with sufficient surety to the corporation in a sum not exceeding double the market value of the stock to indemnify the corporation against any loss or claim which may arise by reason of the issue of a certificate in place of such lost or destroyed stock certificate." [1253]

The last sentence of this section is new, and is declaratory of the usual practice before the act in regard to lost certificates.

The reason of the custom is that a corporation issuing a new certificate is liable to a purchaser of the old certificate supposed to be lost or destroyed, and its good faith is no defence.[1254]

It is usual and proper for the board of directors or the executive committee to pass upon each case of lost certificates, and to specially authorize the issuance of new ones; and it is well for the new certificate to state that it is issued to take the place of one which has been lost.

The court is the final arbiter of the question whether a certificate has been lost, and no by-law providing that the directors shall decide the matter can oust the court of its jurisdiction.[1255]

In case a certificate is lost or stolen the owner should notify the clerk of the corporation in order to stop transfer, and should also advertise for the return of the certificate.

§ 32. Unclaimed dividends.

"Every corporation shall, once in every five years, publish three times successively in a newspaper in the city of Boston, and also in a newspaper in the county in which the principal office of the corporation is located, a list of all dividends which have remained unclaimed for two years or more and the names of the persons to whose credit such dividends stand." [1256]

[1253] St. 1903, c. 437, § 31; R. L., c. 110, § 28; Pub. St., c. 106, § 30; St. 1870, c. 224, § 26. Not cited on this point to 193 Mass.

[1254] Railroad Co. v. Robbins, 35 Ohio St. 483; Cushman v. Thayer Manuf. Jewelry Co., 76 N. Y. 365.

[1255] Webber v. Cambridgeport Savings Bank, 186 Mass. 314 (case of a lost bank book); Miles v. Schmidt, 168 Mass. 339.

[1256] St. 1903, c. 437, § 32; R. L., c. 109, § 40; Pub. St., c. 105, § 27; Gen. St., c. 68, § 19; St. 1837, c. 56. Not cited to 193 Mass. This provision is substantially the same as in the Revised Laws.

a. Dividends, generally.[1257]

"Money earned by a corporation is corporate property, and not the separate property of the stockholders, unless and until distributed among them by the corporation. In the absence of any restraining statute, the corporation may treat it and deal with it, either as an increase of its property or as profits of its business." [1258]

"It seems to be settled that, when a dividend has been fully declared, the corporation thereby manifests its intention that the amount of the dividend should be considered as having been separated from the other property of the corporation, and as having become the individual property of the stockholders, and that therefore, when the dividend becomes payable according to the terms of the vote declaring it, each stockholder has a right to demand payment of the proportional part of the dividend which belongs to his shares of stock, and to sue the corporation for it if it is not paid on demand. In some cases, money or other property equal to the whole amount of the dividend has been specifically set apart as a fund appropriated to the payment of the dividend, and the stockholders have been regarded as the *cestuis que trust* of this fund, each entitled to his share. In other cases, the corporation has credited the stockholders with the amount of their shares of the dividend, and the stockholders have assented to this, and the amount so credited has been regarded as a debt of the corporation to the stockholders; or the corporation has paid to some of the stockholders their shares of the dividend, and has refused to pay anything to the others, and it has been held that the corporation must pay all alike.[1259] . . . The setting apart of a fund to

[1257] As to dividends of co-operative associations, see infra, § 93.

[1258] Rand v. Hubbell, 115 Mass. 461, 474, per Gray, C. J. Cf. Boston & Lowell R. Co. v. Commonwealth, 100 Mass. 399. "Dividend" often means merely share of profits. Henry v. Great Northern Railway, 1 De G. & J. 642.

[1259] Beers v. Bridgeport Spring Co., 42 Conn. 17; State v. Baltimore & Ohio R. Co., 6 Gill, 363; King v. Paterson & Hudson R. Co., 5 Dutch. 504; Jermain v. Lake Shore & Michigan Southern Railway, 91 N. Y. 483; Hopper v. Sage, 112 N. Y. 530; Jackson v. Newark Plankroad Co., 2 Vroom, 277; Wheeler v. Northwestern Sleigh Co., 39 Fed. Rep. 347; Barnard v. Vermont, etc., R. Co., 7 Allen, 512, 519.

pay a dividend has been held to give a lien on it to the stockholders, which they can enforce to the exclusion of the general creditors of the corporation." [1260]

The promise of a corporation to pay a dividend is, therefore, not a simple contract with the stockholders; [1261] and, if a dividend has been declared, but has not been made public nor communicated to the stockholders or set apart in a separate fund, the vote declaring it can be rescinded.[1262]

The duty and responsibility for declaring dividends rests solely with the directors, and cannot be delegated.[1263]

b. To whom payable.

The present act provides that transfers without registration shall not affect the right of a corporation to pay dividends to the stockholders of record, and it is customary to close the stock-transfer books for a certain number of days before the dividend is payable.[1264] On the stock exchange any given stock usually sells "ex-dividend" on the day the books are closed. In the case of stocks carried by brokers on margin, the customer is credited with the dividends on long stock as soon as paid by the corporation to the broker, and debited with the amount of the dividend on short sales.

A corporation may maintain a bill of interpleader against two opposing claimants of a dividend.[1265]

c. — As between vendor and vendee.

As between a vendor and a vendee of shares, the former is entitled to all dividends declared before the sale, though not payable until afterwards; for the declaration of the dividend separates it from the general ownership of the stock, and the

[1260] Ford v. Easthampton Rubber Thread Co., 158 Mass. 84, 86, per Field, C. J., citing on the last point Re Le Blanc, 14 Hun, 8, 75 N. Y. 598. Cf. Oliver v. Washington Mills, 11 Allen, 268, 273.

[1261] Ford v. Easthampton Rubber Thread Co., 158 Mass. 84.

[1262] Ford v. Easthampton Rubber Thread Co., 158 Mass. 84.

[1263] Penn. Iron Works Co. v. Mackenzie, 190 Mass. 61.

[1264] Cf. Sargent v. Essex Marine R. Co., 9 Pick. 202.

[1265] Salisbury Mills v. Townsend, 109 Mass. 115.

stockholders become at once creditors for the amounts payable to them.[1266]

Where, as sometimes happens, a contract to sell stock is made after a meeting declaring a dividend to stockholders of record on a day later than the contract, payable still later, it seems that the dividend is not really declared until the second date, and if the title to the stock passes before that date it carries the dividend with it.[1266a]

The general principle applies also to sales under legal process.[1267]

d. Remedy of stockholders.

Where no dividend has been declared, an action at law cannot be maintained, the relief, if any, being in equity.[1268]

Whether dividends shall be paid, and when, lies in the discretion of the directors, and unless they are fraudulent or negligent, equity will not interfere.[1269] But, in a proper case, equity will compel directors to pay a dividend, at the suit of a stockholder.[1270]

Dividends are payable only out of net profits;[1271] and, if

[1266] Re Foote, 22 Pick. 299; Goodwin v. Hardy, 57 Me. 143; Hopper v. Sage, 112 N. Y. 530.

[1266a] See Phinizy v. Murray, 83 Ga. 747, 6 L. R. A. 426; Spear v. Hart, 3 Robt. (N. Y.) 420; Harris v. Stevens, 7 N. H. 454; Currie v. White, 45 N. Y. 822.

[1267] Smith v. Northampton Bank, 4 Cush. 1.

[1268] Field v. Lamson, etc., Manuf. Co., 162 Mass. 388, 395; Williston v. Michigan Southern, etc., R. Co., 13 Allen, 400. Cf. Minot v. Paine, 99 Mass. 101.

[1269] New York, etc., R. Co. v. Nickals, 119 U. S. 296; Pratt v. Pratt, 33 Conn. 446; Jackson v. Newark Plank Road Co., 31 N. J. L. 277; Fougeray v. Cord, 50 N. J. Eq. 185; Williams v. Western Union Telegraph Co., 93 N. Y. 162; Belfast, etc., R. Co. v. Belfast, 77 Me. 445. See Barnard v. Vermont, etc., R. Co., 7 Allen, 512.

[1270] Belfast, etc., R. Co. v. Belfast, 77 Me. 745; Hazeltine v. Belfast, etc., R. Co., 79 Me. 411; Storrow v. Texas, etc., Manuf. Assoc., 67 Fed. Rep. 612; Pratt v. Pratt, 33 Conn. 446. See Barnard v. Vermont, etc., R. Co., 7 Allen, 512.

[1271] Field v. Lamson, etc., Co., 162 Mass. 388; Wood v. Dummer, 3 Mason, 308; Warren v. King, 108 U. S. 389; Taft v. Hartford, etc., R. Co., 8 R. I. 310; Hughes v. Vermont Copper Mining Co., 72 N. Y. 207.

As to how profits are to be determined, see 2 Clark & Marshall, Corp., § 520.

improperly paid, may be recovered by the corporation at law or by a receiver, creditors or dissenting stockholders.[1272]

After a dividend has been declared, and after a demand by the stockholder,[1273] an action at law will lie against the corporation to recover the dividend.[1274] The treasurer of the corporation is not, however, personally liable to a stockholder for neglect or refusal to pay a dividend, although he has sufficient funds to pay it.[1275] And a holder who is not registered must apply for a transfer on the books before he can demand the dividend.[1276]

Where a dividend is unlawfully withheld, a stockholder is entitled to interest on it from the date of demand,[1277] but not where the corporation is prevented from paying by attachments on the stock.[1278]

e. Guaranteed dividends.[1279]

Where the charter of a corporation required the corporation to guarantee dividends, it was held that the guaranty was an absolute one, and was not conditional upon the earning of profits, and that the stockholders were creditors to that extent.[1280] But, in general, the guaranty of dividends on preferred stock is "out of net earnings," and the liability is contingent upon the accumulation of net earnings sufficient to pay them.[1281]

[1272] 2 Clark & Marshall, Corp. 1636. The cases of Vose v. Grant, 15 Mass. 505, and Spear v. Grant, 16 Mass. 9, held that stockholders were not liable to creditors of the corporation at law.

[1273] Hagar v. Union Nat. Bank, 63 Me. 509; Scott v. Central Railroad, etc., Co., 52 Barb. 45.

[1274] Ellis v. Essex Merrimack Bridge, 2 Pick. 243; French v. Fuller, 23 Pick. 108. Cf. Allen v. Herrick, 15 Gray, 274.

[1275] French v. Fuller, 23 Pick. 108.

[1276] St. 1903, c. 437, § 28; Sargent v. Essex Marine R. Co., 9 Pick. 202.

[1277] Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157.

[1278] Mustard v. Union Nat. Bank, 86 Me. 177.

[1279] Cf. supra, § 27, *b*.

[1280] Williams v. Parker, 136 Mass. 204 (special stock).

[1281] Williston v. Michigan Southern, etc., R. Co., 13 Allen, 400; Field v. Lamson, etc., Manuf. Co., 162 Mass. 388, 390, 393. Cf. Daley v. People's Building, etc., Assoc., 172 Mass. 533. See Gardner Savings Bank v. Taber-Prang Co., 189 Mass. 363.

f. Scrip and bond dividends.

A scrip dividend is a dividend of certificates giving the holder certain rights, and is usually made when the corporation has profits which are in the form of property which will be sold later, but which cannot be conveniently divided at the time it is desired to make the dividend payable.[1282] Scrip is substantially the same thing as stock without the voting power, and may be issued when it can be done without impairing the capital of the corporation.

A distribution of bonds of the corporation among its stockholders is sometimes resorted to as a method of making a dividend, and is proper if the capital stock is not impaired and corporate creditors do not object.[1283]

Sometimes bonds or notes are issued convertible in the future, under certain conditions, into stock.[1284] In such a case, before conversion, the bondholder does not become a stockholder either in equity or at law, and is therefore not entitled to any special rights or privileges conferred upon the stockholders.[1285]

g. Stock dividends.

The distribution of dividends in the form of additional shares of stock has been common in the case of foreign corporations,[1286] and has sometimes been resorted to in the case of domestic corporations.[1287]

The present corporation act does not expressly refer to the matter of stock dividends, though it provides that stock may be issued for cash property, services or expenses,[1288] and that in

[1282] 2 Cook, Corp., 5th ed., § 535; 2 Clark & Marshall, Corp., § 523d.

[1283] 2 Cook on Corp., § 535; State v. Baltimore & Ohio R. Co., 6 Gill (Md.) 363. As to a distribution of profits by the Adams Express Company, a joint-stock company, by means of certain instruments called "bonds," see D'Ooge v. Leeds, 176 Mass. 558.

[1284] Pratt v. American Bell Telephone Co., 141 Mass. 225; John Hancock, etc., Ins. Co. v. Worcester, etc., R. Co., 149 Mass. 214; Day v. Worcester, etc., R. Co., 151 Mass. 302. See infra, § 40, *c*.

[1285] Pratt v. American Bell Telephone Co., 141 Mass. 225; Parkinson v. West End Street Railway Co., 173 Mass. 446, 448.

[1286] Minot v. Paine, 99 Mass. 101; Daland v. Williams, 101 Mass. 571.

[1287] Minot v. Paine, 99 Mass. 101 (Western Railroad Co.).

[1288] Supra, § 14.

case of an increase of capital, the articles of amendment shall describe the property, services or expenses for which such new stock is to be issued and the amount of stock to be issued therefor or for cash.[1289]

These provisions would seem to require full payment for all stock issued, in some form,[1290] and to make a stock dividend invalid, unless the provision of section 42 that the corporation, by vote of a majority of all its stock, may determine the terms and manner of the disposition of new stock, authorizes a stock dividend.

The same result has been sometimes attempted to be reached, in another way, by making a cash dividend which stockholders can use to purchase new stock. Such a dividend, if the stockholder is not required to use it to pay for new stock, is strictly a cash dividend,[1291] and therefore not objectionable, on any construction of the statute. But, if the directors vote that the dividend can be used only to pay for stock and that the new stock shall be issued only to old stockholders, it is a stock dividend.[1292]

It may be noted that the railroad act forbids the declaring of any stock or scrip dividend,[1293] and the same is true of other public service corporations.[1294] This is an argument that the silence of the business corporation act means that stock dividends are permissible for business corporations. Of course, the reasons against large dividends for public service corporations, which have a practical monopoly of their business, do not apply to the same extent to a private corporation.[1295]

[1289] Infra, § 42.

[1290] Cf. Tucker on Corp., 2d ed., 215, and R. L., c. 109, § 29; c. 110, §§ 31–34.

[1291] Lyman v. Pratt, 183 Mass. 58; Davis v. Jackson, 152 Mass. 58. Cf. Hemenway v. Hemenway, 181 Mass. 406.

[1292] Rand v. Hubbell. 115 Mass. 461. The court did not, however, discuss the validity of the stock dividend in this case. See p. 478. Cf. D'Ooge v. Leeds, 176 Mass. 558; Boston & Lowell R. Co. v. Com., 100 Mass. 399; Daland v. Williams, 101 Mass. 571; Jones v. Brown, 171 Mass. 318, 322.

[1293] St. 1906, c. 463, § 63; R. L., c. 109, § 20.

[1294] R. L., c. 109, § 20.

[1295] See Cook on Corp., 5th ed., § 51. Cf. Com. v. Boston & Albany R. Co., 142 Mass. 146.

Questions as to stock dividends frequently arise in the administration of trusts, and, as between the life tenant and the remainderman, the general rule is that cash dividends, however large, are to be regarded as income, while stock dividends, however made, are considered capital.[1296] Rights are also capital.[1297]

F. LIABILITY OF STOCKHOLDERS AND DIRECTORS.

§ 33. Liability of Stockholders.

"The stockholders of a corporation which reduces its capital stock contrary to the provisions of section forty-three shall be liable for the payment of the debts and contracts of the corporation existing at the time of such reduction to the extent of the amount withdrawn and paid to them respectively. The stockholders of a corporation shall also be liable for all money due to operatives for services rendered within six months before demand made upon the corporation and its neglect or refusal to make such payment. A stockholder who pays on a judgment or otherwise more than his proportion of any such debt shall have a claim for contribution against the other stockholders." [1298]

[1296] D'Ooge v. Leeds, 176 Mass. 558, 560; Minot v. Paine, 99 Mass. 101, 108; Daland v. Williams, 101 Mass. 571; Leland v. Hayden, 102 Mass. 542, 550; Rand v. Hubbell, 115 Mass. 461; Gifford v. Thompson, 115 Mass. 478; Adams v. Adams, 139 Mass. 449, 452; Davis v. Jackson, 152 Mass. 58; Hemenway v. Hemenway, 181 Mass. 406; Lyman v. Pratt, 183 Mass. 58. Cf. Atkins v. Albree, 12 Allen, 359; Harvard College v. Amory, 9 Pick. 446; Balch v. Hallett, 10 Gray, 402; Reed v. Head, 6 Allen, 174.

[1297] Atkins v. Albree, 12 Allen, 359.

[1298] St. 1903, c. 437, § 33; R. L., c. 110, § 59; Pub. St., c. 106, § 61; St. 1876, c. 1, § 1; St. 1875, c. 177, § 1; St. 1870, c. 224, § 39; St. 1862, c. 218, § 2; Gen. St., c. 60, §§ 12, 17, 22; c. 68, § 16; St. 1855, c. 290; St. 1852, c. 9; St. 1851, c. 133, § 15; c. 252; Rev. St., c. 38, §§ 16, 21, 32, 33; St. 1829, c. 53, §§ 6, 7, 10, 11; St. 1826, c. 137, § 2; St. 1821, c. 38.

Citations. — R. L., c. 110, § 59: Anthony, etc., Co. v. Metropolitan Art Co., 190 Mass. 38.

Pub. St., c. 106, § 61: Brown v. Eastern Slate Co., 134 Mass. 590; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 429, 28 N. E. Rep. 300.

St. 1876, c. 1, § 1: Brown v. Eastern Slate Co., 134 Mass. 590.

St. 1870, c. 224, § 39: First Nat. Bank of Salem v. Almy, 117 Mass. 478; Nickerson v. Wheeler, 118 Mass. 299; Burnap v. Haskins Steam Engine Co., 127 Mass. 586; Thompson v. Bemis Paper Co., 127 Mass. 598; Brown v. Eastern Slate Co., 134 Mass. 590; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 432, 28 N. E. Rep. 300.

This section marks one of the principal changes in the Massachusetts corporation law, and relieves stockholders from the most serious burdens formerly imposed. Under the present act stockholders are liable, only, (1) in cases of illegal reduction of capital; (2) for six months' wages of operatives, where the corporation does not pay them.

In Maine, New York, New Jersey, Delaware and West Virginia there is no personal liability on stockholders whose stock is fully paid and the capital has not been reduced, except that there is a similar provision as to wages of employees in New York.

a. Construction of this section.

The liability for corporate debts on the part of members of the corporation is created solely by statute, and such statutes

St. 1870, c. 224, § 39, cl. 1: Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 564.

St. 1870, c. 224, § 39, cl. 2: Thompson v. Bemis Paper Co., 127 Mass. 596.

St. 1870, c. 224, § 39, cl. 4: American Tube Works v. Boston Machine Co., 139 Mass. 9, 29 N. E. Rep. 63.

St. 1870, c. 224, § 39, cl. 5: Burnap v. Haskins Steam Engine Co., 127 Mass. 587.

St. 1862, c. 218, § 2: Peele v. Phillips, 8 Allen, 89; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385; Nickerson v. Wheeler, 118 Mass. 299.

Gen. St., c. 60, § 12: Williams v. Parker, 136 Mass. 207.

Gen. St., c. 68, § 16: Bell v. Spaulding, 3 Allen, 486; Atty. Gen. v. Mercantile Ins. Co., 121 Mass. 525.

Gen. St., c. 60, § 17: Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 429, 28 N. E. Rep. 300; 1 Op. Atty.-Gen. 659, 663.

St. 1855, c. 290: Allen v. Herrick, 15 Gray, 274; Williams v. Parker, 136 Mass. 207; American Tube Works v. Boston Machine Co., 139 Mass. 9, 29 N. E. Rep. 63.

St. 1852, c. 9: Atty.-Gen. v. Mercantile Ins. Co., 121 Mass. 525.

St. 1851, c. 133, § 15: Bell v. Spaulding, 3 Allen, 485.

St. 1851, c. 252: Bell v. Spaulding, 3 Allen, 485.

Rev. St., c. 38, § 16: Stedman v. Eveleth, 6 Met. 123; Curtis v. Harlow, 12 Met. 4; Knowlton v. Ackley, 8 Cush. 96; Wyman v. American Powder Co., 8 Cush. 182; Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. 580; Holyoke Bank v. Burnham, 11 Cush. 186; Thayer v. Union Tool Co., 4 Gray, 75; Cabot Bank v. Bodman, 11 Gray, 137; Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 14 Gray, 194; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray, 219; Howe v. Boston Carpet Co., 16 Gray,

being penal in their nature are to be construed strictly.[1299] The liability cannot be imposed by a by-law.[1300] "Such a power would be liable to great abuse, and would subject every member of a corporation, however liberal its charter in excluding individual liability, to be made responsible for the entire indebtedness of the corporation by the act of a majority of those convened at a meeting of such corporation."[1301] It is possible, however, that where money is lent to the corporation upon the faith of such a by-law, subscribed to by the defendant, he may be held individually liable to a primary liability on a different ground from that of a stockholder's liability as such;[1302] and, of course, if stockholders personally enter into obligations they are personally liable;[1303] although, if oral, the representations may be within the statute of frauds.[1304]

496; Cary v. Holmes, 2 Allen, 498; s. c., 16 Gray, 127; Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 570; Potter v. Stevens Machine Co., 127 Mass. 594.

Rev. St., c. 38, § 21: Holyoke Bank v. Burnham, 11 Cush. 186.

Rev. St., c. 38, § 32: Knowlton v. Ackley, 8 Cush. 98; Thayer v. Union Tool Co., 4 Gray, 75; Cary v. Holmes, 16 Gray, 127; s. c., 2 Allen, 499.

St. 1829, c. 53, § 6: Mill Dam Foundery v. Hovey, 21 Pick. 419; Bordman v. Osborn, 23 Pick. 300; Holyoke Bank v. Burnham, 11 Cush. 189; Child v. Boston & Fairhaven Iron Works, 137 Mass. 519.

St. 1829, c. 53, § 7: Mill Dam Foundery v. Hovey, 21 Pick. 454; Howe v. Boston Carpet Co., 16 Gray, 497.

St. 1829, c. 53, § 10: Mill Dam Foundery v. Hovey, 21 Pick. 454; Child v. Boston & Fairhaven Iron Works, 137 Mass. 519.

St. 1829, c. 53, § 11: Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 4 Allen, 243; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 564.

St. 1821, c. 38: Kelton v. Phillips, 3 Met. 63; Stone v. Wiggin, 5 Met. 317; Curtis v. Harlow, 12 Met. 4; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

See also, generally, Andrews v. Callender, 13 Pick. 484; Merchants' Bank v. Stevenson, 10 Gray, 232; Stone v. Fenno, 6 Allen, 579; Byers v. Franklin Coal Co., 106 Mass. 131.

[1299] Stedman v. Eveleth, 6 Met. 114; Andover Free Schools v. Flint, 13 Met. 539; Gray v. Coffin, 9 Cush. 192.

[1300] Andover Free Schools v. Flint, 13 Met. 539; Flint v. Pierce, 99 Mass. 68.

[1301] Andover Free Schools v. Flint, 13 Met. 539, 543, per Dewey, J.

[1302] Flint v. Pierce, 99 Mass. 68.

[1303] Tileston v. Newell, 13 Mass. 406.

[1304] Andover Free Schools v. Flint, 13 Met. 539, 543.

b. Who may enforce the liability.[1305]

A creditor who is also a stockholder, and as such liable for its debts, is not entitled to the remedies afforded by statute to creditors against stockholders for the debts of the corporation;[1306] and a person to whom a stockholder has transferred a promissory note of the corporation, for the sole purpose of enabling him to obtain judgment upon it in his own name, and to bring a bill in equity to enforce the personal liability of the stockholders, stands in no better position than his assignor.[1307] Query, whether a merely equitable owner would be disabled likewise.[1308] But the fact that a creditor holds collateral from a stockholder does not prevent his proceeding against the corporation if insolvent, or oblige him to apply his security in payment or surrender it to the assignees.[1309]

It is competent for parties contracting with a corporation to agree that there shall be no personal liability for a particular debt, and if the debt is evidenced by a written instrument the agreement may be oral.[1310]

c. To whom the liability extends — Construction of statute.

Under section 36 of the present act, any creditor may, after the corporation has been adjudicated bankrupt or has neglected for thirty days after a demand on execution to pay a judgment, bring his bill against it and "all persons who are liable to the plaintiff as stockholders or officers."

Under the previous law the bill was to be brought against the corporation "and all persons who were stockholders at the

[1305] See also infra, § 36, *i*.

[1306] Thayer v. Union Tool Co., 4 Gray, 75; Potter v. Stevens Machine Co., 127 Mass. 592; Thompson v. Bemis Paper Co., 127 Mass. 595; Thacher v. King, 156 Mass. 490. In Peirce v. Partridge, 3 Met. 44, it was held a stockholder might levy on or attach corporate property although he was liable to satisfy other judgments against the corporation.

[1307] Potter v. Stevens Machine Co., 127 Mass. 592. Cf. Thayer v. Union Tool Co., 4 Gray, 75.

[1308] Crease v. Babcock, 10 Met. 525; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray, 216; Thompson v. Bemis Paper Co., 127 Mass. 595.

[1309] Cabot Bank v. Bodman, 11 Gray, 134.

[1310] Brown v. Eastern Slate Co., 134 Mass. 590.

time of the commencement of the suit in which such judgment was recovered." [1311]

Under the present law it is not entirely clear whether, in the case of liability for wages of operatives, for example, the stockholders liable are those when the work was performed, those when the payment of wages was refused or those when action against the corporation was commenced.

Prior to 1862, the language of the statutes was more general,[1312] and under them it was held that those were liable who were stockholders either when the debt was contracted,[1313] or when it was sought to be enforced; [1314] but not those who became stockholders after the debt was contracted and ceased to be such before it became due and action brought,[1315] or those who became stockholders after the debt fell due and ceased to be such before judgment against the corporation.[1316]

d. — Definition of stockholders.

When a corporation has been once created according to law, the incorporated associates who hold the corporate franchise are members of the corporation; and a subscriber for shares, although he has received no certificate of stock, or the stock has not even been divided into shares, is a member of the corporation, and a stockholder, within the meaning of a statute making the stockholders of the corporation personally liable for its debts.[1317]

[1311] R. L., c. 110, § 62; Pub. St., c. 106, § 64; St. 1870, c. 224, § 42; St. 1862, c. 218, § 4. See § 95, infra.

[1312] E. g., St. 1829, c. 53, §§ 6, 10.

[1313] Holyoke Bank v. Burnham, 11 Cush. 188; Mill Dam Foundery v. Hovey, 21 Pick. 454; Johnson v. Somerville Dyeing, etc., Co., 15 Gray, 219.

[1314] Curtis v. Harlow, 12 Met. 3, decided under Rev. St., c. 38, § 16.

[1315] Holyoke Bank v. Burnham, 11 Cush. 188; Child v. Coffin, 17 Mass. 64.

[1316] Handrahan v. Cheshire Iron Works, 4 Allen, 396. Cf. Mason v. Cheshire Iron Works, 4 Allen, 398. Under St. 1826, c. 137, § 1, members were made personally liable, after ceasing to be such, for any debt contracted by the corporation or any debt so contracted which might have accrued while they were stockholders, and it was held no action lay for rent of a quarter commencing after a stockholder had sold his shares, although the lease was executed before such sale. Bordman v. Osborn, 23 Pick. 295.

[1317] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 395, per Gray, J.; Chester Glass Co. v. Dewey, 16 Mass. 94.

So, those are liable in whose becoming members of the corporation there have been formal or technical irregularities which have been waived by the corporation.[1818]

Fiduciary holders.

One who appears upon the books of corporation as a stockholder is liable though he holds the stock as trustee.[1819]

It was formerly provided that estates and funds in the hands of fiduciaries should be liable to no greater extent than the beneficiaries would have been if living, competent and holding in their own names;[1820] but this provision has been repealed.[1821]

Trustee for corporation.

Where shares are transferred to one in trust for the corporation, the trustee is personally liable on shares standing in his name;[1822] and the transferor is likewise liable if he knew the transferee took as such trustee;[1823] but not if he was ignorant of that fact,[1824] or if the corporation is authorized to deal in its own shares as is the law under the present act.[1825]

[1818] Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. 576. This was under St. 1851, c. 315, and it was likewise held in this case that if the corporation had defaulted the stockholder could not deny his liability.

[1819] Crease v. Babcock, 10 Met. 525, 545; Russell v. Estabrook, 71 Conn. 50; McKim v. Glenn, 66 Md. 479.

[1820] R. L., c. 110, § 64; Pub. St., c. 106, § 66; St. 1870, c. 224, § 44; St. 1862, c. 218, § 6; Gen. St., c. 68, § 18; St. 1838, c. 98, § 1; Rev. St., c. 38, § 34; St. 1829, c. 53, § 12; St. 1826, c. 137, § 4.

Citations. — Pub. St., c. 106, § 66: Hudson v. J. B. Parker Machine Co., 173 Mass. 247.

St. 1870, c. 224, § 44: First Nat. Bank of Salem v. Almy, 117 Mass. 478.

Rev. St., c. 38, § 34: Stedman v. Eveleth, 6 Met. 114; Gray v. Coffin, 9 Cush. 200; Mansur v. Pratt, 101 Mass. 60.

[1821] St. 1903, c. 437, § 95.

[1822] Re Empire City Bank, 18 N. Y. 199, 226; Crandall v. Lincoln, 52 Conn. 73. As to when the corporation has a beneficial interest, see Brennan v. Vogler, 174 Mass. 272.

[1823] Johnson v. Laflin, 103 U. S. 800; Crandall v. Lincoln, 52 Conn. 73.

[1824] Johnson v. Laflin, 103 U. S. 800.

[1825] Lawe's Case, 1 De G. M. & G. 421. Cf. Nathan v. Whitlock, 9 Paige, 152.

Where the owner transfers shares directly to the corporation, he remains liable, in States where there is a liability as above described.[1326]

Pledgees.[1327]

The personal liability of the members of a corporation for corporate debts has always depended upon statute, and is to be construed strictly.[1328]

Under the present act, a pledgee can protect himself from statutory liability by taking out a certificate reciting that the shares are held as collateral security.[1329] If, however, a pledgee does not avail himself of such a provision, but takes a certificate absolute upon its face, he is liable as a stockholder.[1330] But a retransfer of shares, made in pursuance of an agreement made contemporaneously with the original transfer, terminates the liability of the one transferring, although done for that very purpose.[1331]

e. — Promoters.

Individuals who attempt to form a corporation, but actually fail in doing so, are of course not liable; and they are not even liable as partners, for they never intended to assume the liability of such.[1332]

f. Nature of liability.

It is provided by section 38 of the present act that "a stockholder shall not be liable to pay a larger amount than the amount of stock held by him at that time at its par value as

[1326] Re Reciprocity Bank, 22 N. Y. 9; Currier v. Lebanon Slate Co., 56 N. H. 262.

[1327] As to pledgees, see also supra, § 28, *h*.

[1328] Gray v. Coffin, 9 Cush. 192.

[1329] The same was true under the old law, R. L., c. 109, § 38; St. 1903, c. 423. Cf. Gurley v. Reed, 190 Mass. 512.

[1330] Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563, 571; Johnson v. Somerville Dyeing, etc., Co., 15 Gray, 216, 219; Holyoke Bank v. Burnham, 11 Cush. 183, 187; Crease v. Babcock, 10 Met. 525, 545.

[1331] Holyoke Bank v. Burnham, 11 Cush. 182.

[1332] First Nat. Bank of Salem v. Almy, 117 Mass. 476; Fay v. Noble, 7 Cush. 188; Trowbridge v. Scudder, 11 Cush. 83; Ward v. Brigham, 127 Mass. 24.

fixed at the time when the liability to be enforced against him personally accrued."

In the present section under consideration, the stockholders are merely "liable" and not "jointly and severally liable," as was provided in earlier statutes;[1333] but if stock certificates have not been issued, the stockholders, as we have seen, own the stock jointly, and therefore are liable jointly as well as severally.[1334]

Discharge of liability.

The discharge of a stockholder in bankruptcy, under proceedings begun before an action is brought against the corporation in which a judgment is obtained, is no defence to liability under this section.[1335] Nor is the fact that the creditors have proved their claims in bankruptcy against the corporation and have received dividends.[1336]

Nor does a composition in bankruptcy between creditors of a corporation and a stockholder who has endorsed notes of the corporation discharge his liability as stockholder.[1337]

But, if the claims of creditors could have been proved

[1333] *Historical.* R. L., c. 110, § 59; Pub. St., c. 106, § 61; St. 1870, c. 224, § 39; St. 1862, c. 218, § 2; Gen. St., c. 60, §§ 12, 17, 22; c. 68, § 16; St. 1855, c. 290; St. 1852, c. 9; St. 1851, c. 133, § 15; c. 252; Rev. St., c. 38, §§ 16, 21, 32, 33; St. 1829, c. 53, §§ 6, 7, 10, 11; St. 1826, c. 137, § 2; St. 1821, c. 38, provided for "joint and several liability." But R. L., c. 110, § 63; Pub. St., c. 105, § 65; St. 1870, c. 224, § 43; St. 1862, c. 218, § 5, limited the liability of any stockholder to the amount of his stock; and it was held that St. 1862, c. 218, changed the earlier law under which each stockholder was liable *in solido* and made him only severally liable. Burnap v. Haskins Steam-Engine Co., 127 Mass. 586, 589. See also infra, § 38.

[1334] Hawes v. Anglo-Saxon Petroleum Co., 111 Mass. 200.

[1335] Barre National Bank v. Hingham Manuf. Co., 127 Mass. 563, 568; Bangs v. Lincoln, 10 Gray, 600 (insolvency). Cf. Kelton v. Phillips, 3 Met. 61; Old Colony, etc., Co. v. Parker, etc., Co., 183 Mass. 557, 561. See infra, §§ 34, *b*, 35, *b*.

[1336] Barre National Bank v. Hingham Manuf. Co., 127 Mass. 563, 567. Such proof would not bar an action at law against the corporation. Athol National Bank v. Hingham Manuf. Co., 121 Mass. 399. Cf. Munson v. Boston, etc., R. Co., 120 Mass. 81; Sohier v. Loring, 6 Cush. 537; Re Marshall Paper Co., 95 Fed. Rep. 419.

[1337] Barre National Bank v. Hingham Manuf. Co., 127 Mass. 563, 568.

against the estate of the stockholder or officer, his discharge in bankruptcy will release him from liability.[1338]

g. What are "debts and contracts."[1339]

"Debts and contracts" in this section does not include liability for a tort not reduced to a judgment,[1340] nor the debts of a corporation to stockholders.[1341] As to the latter, the stockholder who is also a creditor has his remedy in a suit for contribution.[1342]

On the other hand, it does include taxes,[1343] and extends to contracts made in another State.[1344]

h. Liability in case of illegal reduction of capital.

The present act provides that a corporation may, at a meeting duly called for the purpose, by a vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, author-

[1338] Irons v. Manufacturers' Bank, 17 Fed. Rep. 308. Cf. Carey v. Mayer, 79 Fed. Rep. 926.

[1339] Cf. infra, § 34, *o*.

[1340] Child v. Boston and Fairhaven Iron Works, 137 Mass. 516.

"Whatever reason once existed for giving a liberal construction to the word "debt" in the earlier statutes, on the ground that a stockholder in every manufacturing corporation was liable to have his property taken to satisfy any judgment in any civil suit against the corporation, has now ceased to exist, when the stockholders and officers are only liable under special provisions of statute." Ibid., p. 519, per Field, J. In Mill Dam Foundery v. Hovey, 21 Pick. 417, 455, under St. 1829, c. 53, Shaw, C. J., said that a claim for unliquidated damages for breach of contract was clearly intended to be included in the term "debts." See also Byers v. Franklin Coal Co., 106 Mass. 131; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385. Cf. Carver v. Braintree Mfg. Co., 2 Story, 432; Wyman v. American Powder Co., 8 Cush. 168, 182. It was decided that a stockholder's liability under St. 1808, c. 65, § 6, could not be proved under the insolvent law. Kelton v. Phillips, 3 Met. 63. Cf. Ripley v. Sampson, 10 Pick. 371; Andrews v. Callender, 13 Pick. 490; Cutler v. Middlesex Factory Co., 14 Pick. 483.

[1341] Thayer v. Union Tool Co., 4 Gray, 75, 80; Potter v. Stevens Machine Co., 127 Mass. 592.

[1342] Thayer v. Union Tool Co., 4 Gray, 75.

[1343] Felker v. Standard Yarn Co., 148 Mass. 226, 19 N. E. Rep. 220 (action against officers).

[1344] Hutchins v. N. E. Coal Mining Co., 4 Allen, 580.

ize a reduction of its capital stock.[1845] Articles of amendment must then be prepared, setting forth the total amount of stock already authorized and issued, the amount of the reduction, and the manner in which it is to be effected, and a copy of the vote authorizing the reduction.[1846] No reduction can lawfully be made if it leaves the corporation bankrupt or insolvent, but if the assets are not reduced by the reduction, stockholders are not liable, in case of the subsequent bankruptcy of the corporation.[1847]

If these directions are not followed, the section under consideration makes stockholders liable for debts and contracts existing at the time of the reduction, to the extent of the amount so withdrawn and paid them.[1848]

1. Liability for money due to operatives.

The wording in the present act is the same as that of the Revised Laws.[1849]

[1845] St. 1903, c. 437, § 40.

[1846] Ibid., § 43.

[1847] Ibid.

[1848] *Historical.* Under the Revised Laws stockholders were liable, jointly and severally, for the payment of all debts existing at the time of the reduction of capital to the extent of such reduction. R. L., c. 110, § 59, cl. 2. As to the method of reduction, see R. L., c. 110, §§ 30, 31, 32, 35.

In 1829, it was provided "that if any part of the capital stock . . . shall be withdrawn and refunded to the stockholders before the payment of all debts of the company contracted previous to the recording of the copy of a vote for that purpose . . . all shall be jointly and severally liable for the payment." St. 1829, c. 53, § 10. See Rev. St., c. 38, § 21; Gen. St., c. 60, § 22. The change to the wording of the Revised Laws was made in 1862. St. 1862, c. 218, § 2, cl. 2; St. 1870, c. 224, § 39, cl. 2.

[1849] R. L., c. 110, § 59, cl. 4.

Historical. St. 1851, c. 133, § 15, relating to Joint Stock Companies read as follows: "[The stockholders of any corporation, organized under the provisions of this act], shall be jointly and severally, individually liable for all debts that may be due or owing to all their laborers, servants and apprentices, for services performed by themselves, their wives or minor children, as operatives for such corporations, within six months next preceding the demand made for any such debt; and for the recovery thereof, as well as to obtain contribution therefor, in case of payment by any stockholder, like remedies shall be had as are provided in the thirty-sixth chapter of the Revised Statutes in cases of individual liability of stockholders." Rev. St., c. 36, applied to banks, and §§ 32, 33, gave a remedy by bill in equity in cases of contribution. See St. 1828, c. 96, § 14, which was the origin of this provision, and Bell v. Spaulding, 3 Allen, 485.

It is no defence to one of the defendants, in an action to enforce the personal liability of stockholders under this section, that he has paid some of the operatives other sums than those in suit, and has a claim for contribution from the other defendants.[1850]

In a bill in equity under this section, the defendants against whom a decree has been rendered are jointly and severally liable for costs.[1851]

j. Right of contribution.[1852]

In a suit to enforce contribution, the amount of liability of each stockholder is ascertained by considering the total debt and the number of shares held by solvent stockholders within the

St. 1852, c. 252, extended that part of the act of 1851, enclosed in brackets above so as to read: "The stockholders of every corporation organized under any act of incorporation passed since March 11, 1831, or which shall hereafter be organized under any special or general act, for manufacturing, mechanical, mining or quarrying business, etc." Under this act it was held the only remedy was by bill in equity, and that an action at law by an operative against a stockholder would not lie. Bell v. Spaulding, 3 Allen, 485. Cf. Harris v. First Parish in Dorchester, 23 Pick. 112; Crease v. Babcock, 10 Met. 525. The act of 1851 was extended to ice companies by St. 1852, c. 9, and to gas companies by St. 1855, c. 146.

These provisions passed into the General Statutes with no important change, except that an action of contract could be used in place of a bill in equity to compel contribution. Gen. St., c. 68, § 16. The wording of the present act dates with practically no change from 1862. St. 1862, c. 218, § 2, cl. 5; St. 1870, c. 224, § 39; Pub. St., c. 106, § 61.

[1850] Burnap v. Haskins Steam-Engine Co., 127 Mass. 586.

[1851] Burnap v. Haskins Steam-Engine Co., 127 Mass. 586.

[1852] *Historical.* We have already seen that a special right of contribution between stockholders, in the case of payments of debts due operatives, has existed in equity since 1851, and in contract since 1860.

Under St. 1808, c. 65, and St. 1817, c. 183, there was no right of contribution in favor of one who had voluntarily paid a debt of the corporation, though perhaps there may have been such a right where one had been compelled to pay a debt upon execution. Andrews v. Callender, 13 Pick. 484.

The first general act giving a right of contribution, being St. 1829, c. 53, § 11, dealing with manufacturing corporations, provided that: "Any member or members, who may voluntarily, or by compulsion, pay any debt or claim against such corporation, for which he or they are personally liable as aforesaid, shall have a remedy by a bill in chancery before said [Supreme Judicial] court for a contribution against any other member or members for his or their due proportion of such debt or sums so paid, and shall

jurisdiction of the court.[1853] A right of contribution for certain sums paid to operatives is no defence to a suit by operatives for other sums.[1854]

The word "judgment" in the last sentence of this section " is not the joint decree in the suit in equity, but the judgment against the corporation which is a necessary preliminary to

also have a right of action at law against said corporation, to recover the money so paid, in which action only the property of the corporation shall be liable to be taken, and not the person or property of any member of such corporation." This became Rev. St., c. 38, § 32.

The General Statutes repealed this provision, and provided in c. 60, § 35, that one who voluntarily or by compulsion had paid a debt might have an action of contract against the company. This change in the statutes was probably occasioned by the alteration made by St. 1851, c. 315, which made the liability of a stockholder secondary and contingent whereas under the Revised Statutes it was primary and immediate.

The Revised Statutes, in c. 44, § 22, dealing with corporations generally, gave a remedy in equity to compel contribution. This became Gen. St., c. 68, § 17, which provided: "When the officers, stockholders or members of a corporation, or any of them, are liable for any of its debts, or for their acts or omissions respecting its business, or when some of them are liable to contribute for money paid by others on account of such debts, acts or omissions, the party entitled may, instead of any remedy otherwise provided, maintain a suit in equity in the Supreme Judicial Court."

Under this state of the law, it was held that a stockholder could not maintain a bill to enforce contribution for a debt voluntarily paid by him, unless it appeared that an unsatisfied judgment against the corporation had been obtained on such debt, or at least that a demand had been made on the corporation, and no property found which could have been levied on. Cary v. Holmes, 2 Allen, 498, which did not mention Gen. St., c. 68, § 17.

The wording of the Revised Laws originated in 1870, and remained substantially unchanged until the present act. R. L., c. 110, § 59; Pub. St., c. 106, § 58; St. 1870, c. 224, § 39.

Under St. 1851, c. 315, officers who had paid corporate debts under compulsion could not maintain a bill in equity for contribution against the stockholders, Stone v. Fenno, 6 Allen, 579, as the officers were primarily liable. Denny v. Richardson, 4 Gray, 274; Cary v. Holmes, 2 Allen, 498. Cf. Bangs v. Lincoln, 10 Gray, 600, 606; Cambridge Water Works v. Somerville Dyeing, etc., Co., 4 Allen, 239, 242. Stockholders were liable if the officers had no property at the time of execution although the latter might have had sufficient property to pay the debt at the time the action was pending. Brayton v. New England Coal Mining Co., 11 Gray, 493.

[1853] Cary v. Holmes, 16 Gray, 127. Cf. as to a partnership. Whitman v. Porter, 107 Mass. 522, 524.

[1854] Burnap v. Haskins Steam-Engine Co., 127 Mass. 586.

such suit. It contemplates the case where a stockholder, either after judgment against the corporation or before, pays any of the debts for which the stockholders are liable without the expense of litigation in equity, and gives him the right in such case to claim contribution. There is no occasion for providing that, if a stockholder pays a joint judgment against all, he shall have contribution, because he would have a right of contribution independently of the statutes." [1355]

Where a suit is brought for contribution against one who holds stock as guardian, the real estate of such of the wards as are minors at the time of the levy can be taken on execution, but not the real estate of such as have come of age before the decree.[1356]

k. History of stockholders' liability.[1357]

The present section is a radical departure from the corresponding provision of the Revised Laws, only the second, fourth and last clauses of the prior law being retained, yet it may be useful to review the history of stockholders' liability, generally and in regard to the first and third clauses, as a key to explanation of the various decisions.

The corresponding section of the Revised Laws was as follows

"The members or stockholders in any corporation which is subject to the provisions of this chapter shall be jointly and severally liable for its debts or contracts in the following cases, and not otherwise: —

"First, For such as may be contracted before the original

[1355] Burnap v. Haskins Steam-Engine Co., 127 Mass. 586, 591, per Morton, J.

[1356] Mansur v. Pratt, 101 Mass. 60. But see supra, § 33, *d*.

[1357] See also notes to divisions *f*, *h*, *i*, and *j*, in this section.

Where special stock was created under R. L., c. 110, § 36 (see Pub. St., c. 106, § 42; St. 1870, c. 224, § 25; Gen. St., c. 60, § 12; St. 1855, c. 290), general stockholders were liable for all debts and contracts until the special stock was fully redeemed. R. L., c. 110, § 59; Pub. St., c. 106, § 61; St. 1870, c. 224, § 39; St. 1862, c. 218, § 2; Gen. St., c. 60, § 12; St. 1855, c. 290; Allen v. Herrick, 15 Gray, 274; Williams v. Parker, 136 Mass. 204, 207; American Tube Works v. Boston Machine Co., 139 Mass. 5, 29 N. E. Rep. 63.

capital is fully paid in; but only those stockholders who have not paid in full the par value of their shares, and those who have purchased such shares with knowledge of the fact, shall be liable for such debts.

"Second, For the payment of all debts existing at the time when the capital is reduced, to the extent of the amounts withdrawn and paid to stockholders.

"Third, If special stock is created under the provisions of section thirty-six, the general stockholders shall be liable for all debts and contracts until the special stock shall have been fully redeemed.

"Fourth, For all money due to operatives for services rendered within six months before demand made upon the corporation, and its neglect or refusal to make payment.

"Any such member or stockholder who pays, on a judgment or otherwise, more than his proportion of any such debt shall have a claim for contribution against the other members or stockholders."[1858]

I. — Generally, under early laws.

"There are two sets of provisions in our statutes, one making the officers of a corporation, and the other its members, liable, in the cases specified, for the debts and contracts of the corporation. Many of the early charters in this commonwealth made the persons and property of the members of the corporation liable in all cases to be taken on an execution against the corporation, apparently following the analogy of inhabitants of towns. See, for example, the St. of 1791, c. 32, § 4, passed February 23, 1792, incorporating the Proprietors of the Locks and Canals on the Connecticut River; the St. of 1794, c. 55, § 1, passed February 27, 1795, creating a corporation for the purpose of bringing water into the town of Boston; the St. of 1797, c. 67, § 7, passed March 1, 1798, incorporating the Massachusetts Mutual Fire Insurance Company;[1859] the

[1858] R. L., c. 110, § 59.

[1859] Providing that a member insured might take out judgment in case of loss, and satisfy it out of the private property of any director, if the directors had failed to make and collect an assessment, the director to have an action on the case against the corporation.

St. of 1800, c. 63, § 8, passed March 6, 1801, incorporating the Ossapee Mining Company;[1360] the St. of 1803, c. 61, § 6, passed June 23, 1803, incorporating the Danvers and Beverly Iron Works Company,[1361] and the St. of 1804, c. 139, § 8, passed March 16, 1805, incorporating the Amesbury Nail Factory Company.[1362]

"The early charters of insurance companies usually did not make the members liable for the debts of the corporation, but contained a provision that if, after losses had occurred that should be equal to the amount of the capital stock, the president or directors, knowing such losses, should subscribe to any policy, their estates jointly and severally should be accountable for the amount of any loss that should take place under policies thus subscribed. See, for an example, the St. of 1803, c. 42, § 12, passed June 22, 1803, incorporating the Portland Marine and Fire Insurance Company.

"The first general statute was the St. of 1808, c. 65.[1363]

[1360] "Whenever any officer shall have process or execution against said corporation, and cannot find sufficient property to attach or whereon to levy, then the property of any member or members of said corporation shall be liable in the same manner as if the process had been instituted or judgment rendered against him or them."

[1361] "In any action to be brought or in any judgment to be rendered against said corporation, if the said corporation, after seven days' notice and request to the president, secretary or any two of the proprietors, shall neglect or refuse to expose any estate or property which may be attached on mesne process or whereon any such execution may be levied, the plaintiff in such action shall have a right to levy his execution upon or to attach any of the property of the individual members of the corporation in the same manner as if the action had been brought or judgment entered against them in their individual capacity."

[1362] Also St. 1803, c. 113, incorporating the Proprietors of the Boston South Bridge. Section 6 made the bodies of the proprietors liable to be taken on execution in the same manner as the inhabitants of a town when judgment is had against them.

[1363] As to this act, see Taunton & So. Boston Turnpike v. Whiting, 10 Mass. 336, note; Hayden v. Middlesex Turnpike Corp., 10 Mass. 401; Franklin Glass Co. v. White, 14 Mass. 286; Colt v. Root, 17 Mass. 234; Marcy v. Clark, 17 Mass. 330; Washington Bank v. Boston Glass Mfy., 6 Pick. 375; Ripley v. Sampson, 10 Pick. 371; Tripp v. Swanzey Paper Co., 13 Pick. 291; Russell v. McLellan, 14 Pick. 69; Cutler v. Middlesex Factory Co., 14 Pick. 483; Curtis v. Harlow, 12 Met. 4; Melledge v. Boston Iron Co., 5 Cush. 159; Gray v. Coffin, 9 Cush. 199; Stebbins v. Merritt, 10

By § 6 an execution issued on any judgment in any civil action against a manufacturing corporation, if the corporation did not within fourteen days after demand show to the officer sufficient property to satisfy the judgment, could be levied upon the body or upon the real or personal estate of any member of the corporation. By the St. of 1817, c. 183, if the corporation did not, before the return day of any execution, issued on any judgment in any civil action against a manufacturing corporation, show to the officer sufficient property to satisfy the judgment, an *alias* execution might be taken out and levied upon the body or estate of any member of the corporation, or upon the body or estate of any person who was a member of the corporation at the time when the debt accrued 'upon which such writs or executions may have issued.' [1864]

"The St. of 1821, c. 38, provided 'that every person who shall become a member of any manufacturing corporation, which may hereafter be established within this commonwealth, shall be liable, in his individual capacity, for all debts contracted during the time of his continuing a member of such corporation.' [1865]

"The general liability of members of corporations established by the St. of 1808, c. 65, for all manufacturing corporations thereafter created, was limited to special cases by the St. of 1829, c. 53, as to all manufacturing corporations created after this act, with a provision that manufacturing corporations already existing might adopt the act, § 13, and thus render their members not liable thereafter to have their persons or property taken on writs or execution against the corporation, 'except for the causes, and in the manner, herein provided.' This statute, by sections 6, 9, 10, made the officers personally liable for claims and demands against, or debts of, the cor-

Cush. 31; Erickson v. Nesmith, 4 Allen, 235; Com. v. Intoxicating Liquors, 115 Mass. 153; Mechanics' Foundry & Machine Co. v. Hall, 121 Mass. 274; Central Bank v. Williston, 138 Mass. 246.

[1864] See Leland v. Marsh, 16 Mass. 389; Marcy v. Clark, 17 Mass. 330; Stone v. Wiggin, 5 Met. 317.

[1865] As to this act, see Kelton v. Phillips, 3 Met. 63; Stone v. Wiggin, 5 Met. 317; Curtis v. Harlow, 12 Met. 4; Child v. Boston, etc., Iron Works, 137 Mass. 517.

poration, under special circumstances. See Rev. St., c. 38, § 27; Gen. St., c. 60, § 28." [1866]

Under the Revised Statutes, no action at law lay against stockholders on a contract made originally with the corporation; but the only remedy was to take their persons and property on an execution against the corporation, or to bring a bill in equity against them.[1867] A creditor could not proceed against stockholders not officers until a judgment at law against the corporation, although the action was in equity and the corporation had been made a party defendant.[1868]

St. 1862, c. 218, " was passed for the purpose of limiting the liability for the debts of corporations, which attached to officers and stockholders under the previously existing laws. Before then each stockholder was liable for the whole of the debts of the classes named *in solido,* though he might be the owner of only a single share of the stock, of a value much less than such debts. . . . the statute intended to provide . . . that each stockholder should be liable severally for a *pro rata* part of the whole amount ascertained to be due to all the creditors, in the proportion which his stock has to the whole capital stock, provided that he shall in no event be liable for more than the par value of his stock." [1869] Under this act, stockholders were held to be sufficiently described in a bill in equity, alleging that they were " members of and stockholders in said corporation, holding the stock of the same undivided," [1870] and it was likewise held that the bill need not allege the part value of the shares.[1871]

The following language of the court well describes the reason for the distinction in the earlier statutes between the liability of stockholders and the liability of officers of a corporation:

[1866] Knowlton v. Ackley, 8 Cush. 93. See Rev. St., c. 38, §§ 30, 31.

[1867] Cambridge Water Works v. Somerville Dyeing, etc., Co., 4 Allen, 243; Cary v. Holmes, 2 Allen, 498.

[1868] Child v. Boston & Fairhaven Iron Works, 137 Mass. 516, 517, per Field, J.

[1869] Burnap v. Haskins Steam-Engine Co., 127 Mass. 586, 589, per Morton, J.

[1870] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385.

[1871] Ibid.

"It is easy to perceive the reason which probably induced the legislature to ordain that this distinction in the remedies which it gave authority for pursuing against the two classes of persons liable for the debts of the corporation should exist. The officers have the control and management of its affairs, and may therefore be presumed to know whether the claims preferred against it are justly due, and when a defence ought to be interposed against a claim for which payment is demanded, and how and in what manner and by what means an unjust demand may be most effectually resisted. The mere stockholder cannot be supposed to have any, or an equal amount of, such knowledge and advantages in respect to the contracts and obligations of the company. He has no personal possession of the books or records of the company; he does not transact its business, and has no special means by which he may ascertain what contracts have been made or what liabilities may have been incurred on its account. And although it may be very just and reasonable that the stockholder shall be held ultimately responsible for the due performance of all the obligations of a company in which operations and gains they have a direct and immediate interest, it would hardly be thought reasonable to allow coercion to be used against them as means of enforcing payment before the claim against the company was clearly proved and judicially established." [1372]

m. — For debts contracted before capital fully paid in.

In 1829, it was provided that "all members of a company shall be jointly and severally liable for all debts and contracts made by such company until the whole amount of the capital stock . . . shall have been paid in, and a certificate thereof shall have been made and recorded in the registry of deeds . . ." [1373] In 1862, the liability attached for debts "contracted before the capital is fully paid in and a certificate thereof duly recorded,[1374] and in 1870 a proviso was added: "But stockholders who have paid in full the par value of

[1372] Cambridge Water Works v. Somerville Dyeing, etc., Co., 4 Allen, 239, 242, per Merrick, J. See also Stone v. Fenno, 6 Allen, 579.

[1373] St. 1829, c. 53, § 6, later Rev. St., c. 38, § 16; Gen. St., c. 60, § 17.

[1374] St. 1862, c. 218, § 2, cl. 1. Cf. Pub. St., c. 106, § 61, cl. 1.

their shares shall not be liable for such debts."[1875] In 1875, the wording was amended so that liability attached "for such [debts] as may be contracted before the original capital is fully paid in, but those stockholders only who have not paid in in full the par value of their shares and those who have purchased such shares with knowledge of the fact shall be liable for such debts.[1876]

The certificate that the capital had been paid in, above mentioned, was for the protection of the stockholders, not the public.[1877] "Perhaps it was partly in recognition of this fact that the former liability of members until the certificate was filed, even if the stock had been paid in (Gen. St., c. 60, § 17; c. 61, § 5), was dropped in St. 1870, c. 224, § 39, and Pub. St., c. 106, § 61."[1878] It was held under Rev. St., c. 38, the filing of a certificate that the capital had been paid in was conclusive in favor of the stockholders,[1879] but that was decided when the liability of stockholders was otherwise unlimited, and the court decided that the payment and recording of the certificate constituted one condition precedent to exemption. Under later acts, e. g., St. 1870, c. 224, §§ 39, 43, where the liability was more strictly limited, it was held the certificate was not conclusive evidence of the payment of the capital.[1880]

The liability existed under this provision, although the statute contained a prohibition on commencing business before the capital was paid in.[1881] The liability extended to contracts in pursuance of the purposes for which the corporation was organized,[1882] and "the personal liability of members of the corpo-

[1875] St. 1870, c. 224, § 39, cl. 1.

[1876] St. 1875, c. 177, § 1.

[1877] Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 431, 28 N. E. Rep. 300; Barre National Bank v. Hingham Mfg. Co., 127 Mass. 563, 569, 570; Stedman v. Eveleth, 6 Met. 114. Cf. Pub. St., c. 106, § 59.

[1878] Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 432, 28 N. E. Rep. 300.

[1879] Stedman v. Eveleth, 6 Met. 114.

[1880] Barre National Bank v. Hingham Mfg. Co., 127 Mass. 563.

[1881] Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 28 N. E. Rep. 300; First Nat. Bank of Salem v. Almy, 117 Mass. 478.

[1882] Under Gen. St., c. 60, § 17; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 28 N. E. Rep. 300; Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381; Hawes v. Anglo-Saxon Petroleum Co., 101

ration takes the place of what has not been paid in upon the stock as security to the other party."[1383] Such contracts were not void.[1384] The members of a corporation to which a certificate of incorporation had been issued were not liable as partners for doing business before the capital was paid in,[1385] and could be sued as members only in equity after the recovery of judgment against the corporation.[1386]

§ 34. Liability of president, treasurer and directors.[1387]

"The president, treasurer and directors of every corporation shall be jointly and severally liable for all the debts and contracts of the corporation contracted or entered into while they are officers thereof if any stock is issued in violation of the provisions of section fourteen, or if any statement or report which is required by the provisions of this act is made by them which is false in any material representation and which they know to be false; but only the officers who sign such statement or report shall be so liable."[1388]

For notes, see also the following section.

Mass. 385, 111 Mass. 200; Augur Steel Axle, etc., Co. v. Whittier, 117 Mass. 451; 1 Op. Atty.-Gen. 659, 663. Under St. 1870, c. 224; Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 28 N. E. Rep. 300; Old Colony Boot & Shoe Co. v. Parker, etc., Co., 183 Mass. 559. See Kelley v. Newburyport, etc., R. R., 141 Mass. 496, 6 N. E. Rep. 745. Under Pub. St., c. 106, § 46; Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 28 N. E. Rep. 300; 1 Op. Atty.-Gen. 206, 662–664. Cf. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.

[1383] Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 431, per Holmes, J., 28 N. E. Rep. 300.

[1384] Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 28 N. E. Rep. 300; First National Bank v. Almy, 117 Mass. 476; Merrick v. Reynolds Engine, etc., Co., 101 Mass. 381; Attorney-General v. Mass., etc., Gas Co., 179 Mass. 15, 60 N. E. Rep. 389.

[1385] First Nat. Bank of Salem v. Almy, 117 Mass. 478, under St. 1870, c. 224, § 32.

[1386] First Nat. Bank of Salem v. Almy, 117 Mass. 478; Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, and 111 Mass. 200; Priest v. Essex Hat Mfg. Co., 115 Mass. 380; Pollard v. Bailey, 20 Wall. 520.

[1387] As to certain general principles as to liability, see supra, § 33, *a. f.* As to what are "debts and contracts," see supra, § 33, *g.*

[1388] St. 1903, c. 437, § 34; R. L., c. 110, § 58; St. 1898, c. 266; Pub. St., c. 106, § 60; St. 1877, c. 230, § 1; St. 1875, c. 177, § 2; St. 1870, c. 224,

§ 38; St. 1862, c. 218, § 1; Gen. St., c. 60, §§ 17–25, 30; Rev. St., c. 38, §§ 23–25, 28; St. 1829, c. 53, §§ 8, 9; St. 1821, c. 38.

Citations. — St. 1903, c. 437, § 34: Harvey-Watts Co. v. Worcester Umbrella Co., 193 Mass. 140.

R. L., c. 110, c. 58; Heard v. Pictorial Press, 182 Mass. 530; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 565; Anthony, etc., Co. v. Metropolitan Art Co., 190 Mass. 38; Harvey-Watts Co. v. Worcester Umbrella Co., 193 Mass. 140.

St. 1898, c. 266: Atty.-Gen. v. Mass., etc., Gas Co., 179 Mass. 20, 60 N. E. Rep. 389.

Pub. St., c. 106, § 60: Geo. Woods Co. v. Storer, 144 Mass. 400, 11 N. E. Rep. 662; Felker v. Standard Yarn Co., 148 Mass. 227, 19 N. E. Rep. 220; Hunnewell v. Duxbury, 154 Mass. 289, 28 N. E. Rep. 267; Hudson v. J. B. Parker Machine Co., 173 Mass. 247, 53 N. E. Rep. 867; Atty.-Gen. v. Mass., etc., Gas Co., 179 Mass. 20, 60 N. E. Rep. 389; Train v. Marshall Paper Co., 180 Mass. 514, 62 N. E. Rep. 967; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 568.

Pub. St., c. 106, § 60, cl. 3: Child v. Boston & Fairhaven Iron Works, 137 Mass. 517; Thacher v. King, 156 Mass. 491, 31 N. E. Rep. 648; Flint v. Boston Woven Hose Co., 183 Mass. 115.

Pub. St., c. 106, § 60, cl. 5: Child v. Boston & Fairhaven Iron Works, 137 Mass. 517; Felker v. Standard Yarn Co., 150 Mass. 265, 19 N. E. Rep. 220; Hunnewell v. Duxbury, 154 Mass. 288, 28 N. E. Rep. 267; Heard v. Pictorial Press, 182 Mass. 530; International Paper Co. v. Gazette Co., 182 Mass. 578.

St. 1877, c. 230, § 1: Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 564.

St. 1870, c. 224, § 38: Nickerson v. Wheeler, 118 Mass. 299; Felker v. Standard Yarn Co., 148 Mass. 228, 19 N. E. Rep. 220; s. c., 150 Mass. 266; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 568.

St. 1870, c. 224, § 38, cl. 3: Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 566; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

St. 1870, c. 224, § 38, cl. 4: Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

St. 1870, c. 224, § 38, cl. 5: Hunnewell v. Duxbury, 154 Mass. 288, 28 N. E. Rep. 267.

St. 1862, c. 218, § 1: Thayer v. New England Lithographic Co., 108 Mass. 526; Pope v. Salamanca Oil Co., 115 Mass. 290; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

Gen. St., c. 60, § 17: Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 429, 28 N. E. Rep. 300; 1 Op. Atty.-Gen. 659, 663.

Gen. St., c. 60, § 18: Newcomb v. Reed, 12 Allen, 365; Pope v. Salamanca Oil Co., 115 Mass. 290; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

Gen. St., c. 60, § 19: Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

Gen. St., c. 60, § 20: Newcomb v. Reed, 12 Allen, 365; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

Gen. St., c. 60, § 21: Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

a. Liability of officers, generally.

The liability of officers is created solely by statute, and such statutes, being of a penal nature, are to be construed strictly.[1389] But the fact that a liability of officers exists does not affect the validity of the contracts which the corporation has entered into.[1390]

b. Extent of liability.

It should be noted that section 38 of the act, providing that stockholders shall be liable only to the extent of the par value of their stock, does not apply to officers; and it seems, therefore, that officers and directors are liable under sections 34 and 35 without reference to the amount of stock held by them.[1391]

Gen. St., c. 60, § 23: Peele v. Phillips, 8 Allen, 89.

Gen. St., c. 60, § 24: Cochrane v. Reed, 13 Allen, 455.

Gen. St., c. 60, § 25: Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

Gen. St., c. 60, § 30: Child v. Boston & Fairhaven Iron Works, 137 Mass. 517; Felker v. Standard Yarn Co., 148 Mass. 228, 19 N. E. Rep. 220; s. c., 150 Mass. 265; Hunnewell v. Duxbury, 154 Mass. 288, 28 N. E. Rep. 267.

Rev. St., c. 38, 23: Dewey v. Baker, 16 Gray, 130; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

Rev. St., c. 38, § 25: Whittenton Mills v. Upton, 10 Gray, 596; Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 14 Gray, 194; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray, 216; Dewey v. Baker, 16 Gray, 130; Merchants' Bank v. Stevenson, 5 Allen, 400; Merchants' Bank of Newburyport v. Stevenson, 7 Allen, 489; Flint v. Boston Woven Hose, etc., Co., 183 Mass. 115.

Rev. St., c. 38, § 28: Stedman v. Eveleth, 6 Met. 122; Barrett v. Union Mut. Fire Ins. Co., 7 Cush. 176; Stebbins v. Edmands, 12 Gray, 203; Dewey v. Baker, 16 Gray, 130; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517; Felker v. Standard Yarn Co., 150 Mass. 265, 19 N. E. Rep. 220; Hunnewell v. Duxbury, 154 Mass. 288, 28 N. E. Rep. 267.

St. 1829, c. 53, § 9: Child v. Boston & Fairhaven Iron Works, 137 Mass. 519; Hunnewell v. Duxbury, 154 Mass. 288, 28 N. E. Rep. 267.

St. 1821, c. 38: Kelton v. Phillips, 3 Met. 63; Stone v. Wiggin, 5 Met. 317; Curtis v. Harlow, 12 Met. 4; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517. See also, generally, Stone v. Fenno, 6 Allen, 579; Graves v. Morgan, 182 Mass. 161.

[1389] Stedman v. Eveleth, 6 Met. 114; Andover Free Schools v. Flint, 13 Met. 539; Gray v. Coffin, 9 Cush. 192.

[1390] Attorney-General v. Mass., etc., Gas Co., 179 Mass. 15, 20, 60 N. E. Rep. 389.

[1391] Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 564 (a case of liability for excess of debts over capital, under St. 1870, c. 224).

The liability of an officer continues against his estate after his death,[1392] and it is expressly provided in the present act that a suit to enforce liability shall not abate by the death of the defendant.[1393] It also continues although the corporation makes an assignment for the benefit of creditors after the commencement of an action at law, provided the plaintiff in the suit against the officer has reserved his rights against the corporation in giving his assent to the assignment.[1394] In such a case, the plaintiff is entitled to a decree for the amount of his claim, less the dividend under the assignment.[1395]

A bill may be maintained against officers for debts although it states distinct grounds on which they are liable for the debts.[1396]

The liability of officers also continues after a discharge in bankruptcy or insolvency.[1397]

Query, as to the effect upon his liability of the resignation and re-election of an officer, or his re-election after an interval.

De facto officers cannot avail themselves of irregularities or informalities at the meeting at which they were chosen, in order to avoid personal liabilities for debts.[1398]

c. "Debts and contracts." [1399]

The obligation of a corporation, either as the drawer of a bill, or under an express agreement to indemnify an accommo-

[1392] Hudson v. J. B. Parker Machine Co., 173 Mass. 242, 53 N. E. Rep. 867. Cf. Warren v. Para Rubber Shoe Co., 166 Mass. 97, 104, 44 N. E. Rep. 112.

[1393] Infra, § 37.

[1394] Hudson v. J. B. Parker Machine Co., 173 Mass. 242, 53 N. E. Rep. 867 (under Pub. St., c. 106, § 60, cl. 3).

[1395] Ibid. A bill in such a case is not multifarious, although it seeks to charge funds in the hands of the voluntary assignees of the corporation and of a director, and makes them parties. Ibid.

[1396] Pope v. Salamanca Oil Co., 115 Mass. 290.

[1397] Old Colony, etc., Co. v. Parker, etc., Co., 183 Mass. 557, 561; Bangs v. Lincoln, 10 Gray, 600; Lothrop v. Reed, 13 Allen, 294, 296; Barre Nat. Bank v. Hingham Manufacturing Co., 127 Mass. 563. See also infra, § 35, *f*, and as to stockholders, supra, § 33, *d*.

[1398] Thayer v. N. E. Lithographic Co., 108 Mass. 523; Newcomb v. Reed, 12 Allen, 365. Cf. Utley v. Union Tool Co., 11 Gray, 139. See supra, §§ 9 and 11, as to the effect of informalities.

[1399] As to this subject, see also supra, § 33 *g*.

dation acceptor for the payment of a bill, drawn for the benefit of the corporation by a third person, is a debt contracted by the corporation at the time of the acceptance.[1400]

d. Illegal issue of stock.

Among the grounds of liability under this heading might be the issuing of partially paid up stock as if it were fully paid up, i. e., without its being properly stamped, or the issuing of stock subsequent to the original issue without filing the proper certificate and obtaining the consent of the commissioner of corporations, or the issuing of stock originally where the cash, so far as due, has not been paid or the property or services actually conveyed or rendered to the corporation. It will be noted that section 14 makes the directors and treasurer also liable to stockholders for damages in the case last mentioned.

e. False statements and reports.[1401]

Under this provision, officers are liable for debts existing at the time of making a false certificate, as well as debts incurred afterward.[1402] "No doubt one important reason, perhaps the principal reason, for the statutory provisions is to enable persons who may have occasion to deal with corporations to ascertain their condition, and their title to credit, so that a person, whose debt already exists at the time of the filing of the certificate, certainly has not, by any false statement contained therein, been misled into giving credit to the corporation, and may not in any way be injured thereby. But in imposing the penalty of liability for its debts and contracts the statute is not limited to such debts and contracts as were created in favor of persons who had examined and been misled by the false certificate. . . . It is not even limited to debts and contracts which came into existence after the filing of the certificate." [1403]

[1400] Byers v. Franklin Coal Co., 106 Mass. 131.

[1401] Cf., in the case of foreign corporations, infra, § 60, *d*, and § 70.

[1402] Felker v. Standard Yarn Co., 148 Mass. 226, 19 N. E. Rep. 220, decided under Pub. St., c. 106, § 60.

[1403] Ibid., p. 227, per C. Allen, J. Gen. St., c. 60, § 30, made officers

It has always been a requisite of liability that the person to be held signed knowing the statement to be false.[1404] Thus where officers knew of the existence of a tax, but forgot it at the time of making the certificate, it was held they were not liable.[1405] "It was not therefore sufficient to prove that the certificate did not contain the exact truth according to the strict legal interpretation of the statute. It must be made to appear that it was wilfully false, that is, made intentionally with a purpose to deceive. The *scienter* or guilty knowledge intended by the statute must be equivalent to *mala fides* in making the certificate. The statute is penal in its character and is to be strictly construed." [1406]

But it is not necessary that there should be an intention to deceive some one in particular,[1407] and statutes imposing liability do not impliedly give an action of deceit to persons misled by such statements.[1408] Mere oral statements of officers as to the property or prospects of the corporation are within the

liable for all debts of the company contracted while they were stockholders or officers. The omission of the specification in St. 1870, c. 224, § 38, and Pub. St., c. 106, § 60, did not limit the liability to future debts. Ibid., p. 228.

One of the principal objects in trying to secure absolute truth in certificates was originally so that they might be conclusive of the facts therein stated, and upon which the liability of stockholders rested. Stedman v. Eveleth, 6 Met. 122. Cf. Rev. St., c. 38, §§ 17, 28.

[1404] Hunnewell v. Duxbury, 154 Mass. 286, 288; Felker v. Standard Yarn Co., 150 Mass. 264; Stebbins v. Edmands, 12 Gray, 203; Heard v. Pictorial Press, 182 Mass. 530; International Paper Co. v. Gazette Co., 182 Mass. 578; Harvey-Watts Co. v. Worcester Umbrella Co., 193 Mass. 138, 146. Cf. Nash v. Minnesota Title, etc., Co., 163 Mass. 574. See St. 1829, c. 53, § 9; Rev. St., c. 38, § 28; Gen St., c. 60, § 30; St. 1870, c. 224, § 38, cl. 5; Pub. St., c. 106, § 60, cl. 5.

[1405] Felker v. Standard Yarn Co., 150 Mass. 264, 19 N. E. Rep. 220.

[1406] Stebbins v. Edmands, 12 Gray, 203, 205, per Bigelow, J.; International Paper Co. v. Gazette Co., 182 Mass. 578.

[1407] Heard v. Pictorial Press, 182 Mass. 530, 534.

[1408] Hunnewell v. Duxbury, 154 Mass. 286, 28 N. E. Rep. 267; s. c., 157 Mass. 1. This particular case involved the certificate required from foreign corporations by St. 1884, c. 330, § 3; McKinney v. Whiting, 8 Allen, 207. Cf. R. L., c. 74, § 4. This statute applies only to representations made with the intent that the corporation may obtain credit, money or goods thereon. Norton v. Huxley, 13 Gray, 285, 287; Walker v. Russell, 186 Mass. 69, 72. See also supra, chap. IV, C.

statute of frauds, and cannot be considered actionable under this section.[1409]

It is not necessary, for the attaching of liability, that the officers should intend to sell stock or obtain credit on the strength of the false statements signed by them.[1410] Nor is it any defence that they intended to give only an estimated value, for they must know that the public would take it to be an estimated value made in good faith.[1411] Nor is it any defence that plaintiff was not deceived, and entered into his contract with the corporation without having seen the certificate in question.[1412]

In one case, where it was sought to hold the president of a corporation for having signed a false certificate that the capital had been fully paid in, it appeared that the capital in cash had been deposited in a bank, only for the purpose of being replaced later by the note of the president; but as he had been advised by counsel that this proceeding was a compliance with the statute, it was held that there was no evidence of bad faith.[1413] The benefit of acting under advice of counsel is not taken away by the fact that the counsel was also a subscriber for stock.[1414]

The existence of a liability under this section is no ground for an injunction against an officer to restrain him from proceeding with an action against the corporation; for the statute does not create a debt to each creditor of the corporation, but a general liability to all creditors of the class, and the rights sought to be offset are therefore of a different order.[1415]

f. Right of contribution.[1416]

Whether there is a right of contribution between officers who have been compelled to pay debts and contracts under this and

[1409] Hunnewell v. Duxbury, 154 Mass. 286, 28 N. E. Rep. 267.

[1410] Heard v. Pictorial Press, 182 Mass. 530 (foreign corporation).

[1411] Ibid.

[1412] Ibid.

[1413] International Paper Co. v. Gazette Co., 182 Mass. 578. See Harvey-Watts Co. v. Worcester Umbrella Co., 193 Mass. 138, 145.

[1414] Harvey-Watts Co. v. Worcester Umbrella Co., 193 Mass. 138, 145.

[1415] George Woods Co. v. Storer, 144 Mass. 399, 11 N. E. Rep. 662.

[1416] Cf. supra, § 33, *j*.

the following section is doubtful. Under St. 1862, c. 210, where officers neglected to file the certificate required by the act the court said that although the statute made no mention of contribution, "it is not to be inferred from the want of such a provision that they are to be deprived of it, if, according to the general principles of law as applied to the construction of the statute they would be entitled to it."[1417] But in that case the remedy was a suit against all the officers in the nature of an action of contract.[1418] And it was said in the same opinion with regard to the knowingly signing a false certificate: "This, however, would be a distinct and positive wrongful act; for such a transaction none would be responsible except those actually concurring in it, and the maxim *ex turpi causa non oritur actio* might well apply among them, when it did not among those who, while prosecuting the lawful business of managing a corporation, had incurred responsibility by reason of an omission."[1419]

In the present section, only the officers signing false statements or reports are liable, so that the above dictum that there is no contribution among those *in pari delicto* might well apply.

But in regard to the other provision of this section, namely, as to issuing stock in violation of section 14 of the act, it might well happen that the violation would be merely an omission, and then the reasoning of the paragraph of the opinion first cited might well apply.

In any case, there can be no right on the part of officers, who have been compelled to pay debts, against stockholders for contribution, inasmuch as the liabilities are distinct and of a different order, and spring from different sections of the law.[1420]

[1417] Nickerson v. Wheeler, 118 Mass. 295, 299, per Devens, J.

[1418] St. 1862, c. 218, § 4.

[1419] Nickerson v. Wheeler, 118 Mass. 295, 299, per Devens, J.

[1420] Stone v. Fenno, 6 Allen, 579. Thus St. 1851, c. 315, made the officers primarily responsible, while the stockholders were only secondarily responsible. See Cary v. Holmes, 2 Allen, 498; Denny v. Richardson, 4 Gray, 274.

g. History of liability — Early statutes.

St. of 1829, c. 53, for the first time made officers of the corporation liable for its debts, and at the same time give a remedy, which was an action at law or bill in equity against the officers, setting forth the grounds on which such officers had rendered themselves personally liable. This was re-enacted in the Revised Statutes.[1421] Under 1851, c. 315, officers were primarily liable, stockholders only secondarily. This statute altered the relative rights and liabilities of the officers and stockholders as to the payment of the corporate debts.[1422] The main purpose of this act was to place the liability upon those having charge of the corporate affairs, and to make the stockholders only secondarily liable.[1423]

h. — Under the Revised Laws.

The provisions of the Revised Laws corresponding to this section and the next were as follows:

"The officers of a corporation which is subject to the provisions of this chapter shall be jointly and severally liable for its debts and contracts in the following cases, and not otherwise: —

"The president and directors shall be so liable, —

"First, For making or consenting to a dividend if the corporation is or thereby is rendered insolvent to the extent of such dividend. [Section 35 of present act.]

"Second, For debts contracted between the time of making or assenting to a loan to a stockholder and the time of its repayment, to the extent of such loan. [Section 35 of present act.]

"[Third, If the debts of a corporation exceed its capital, to the extent of such excess existing at the time of the commencement of the suit against the corporation in which the judgment was recovered upon which the suit in equity to enforce such liability is brought as hereinafter provided.]

"The president, directors and treasurer shall be so liable, —

"Fourth, For signing any statement filed under the provi-

[1421] Denny v. Richardson, 4 Gray, 274.

[1422] Stone v. Fenno, 6 Allen, 581; Denny v. Richardson, 4 Gray, 274; Carey v. Holmes, 2 Allen, 498; Bangs v. Lincoln, 10 Gray, 600, 606.

[1423] Stone v. Fenno, 6 Allen, 581.

sions of section forty-four, if the property mentioned in such statement is not conveyed and taken at a fair valuation; but only the officer or officers who sign the statement shall be so liable. [Section 34 of present act.]

"The president, directors and other officers shall be so liable, —

"Fifth, For signing any certificate which is required by law knowing it to be false; but only the officer or officers who have knowledge thereof shall be liable. [Section 34 of present act.]

"[Sixth, For debts contracted before the original capital has been fully paid in and the certificate of such payment has been filed in accordance with the provisions of section forty-three.]"[1424]

The last clause of this section was added in 1898.[1425] The clauses enclosed in brackets are not retained in the present law.

Prior to 1877, all officers were liable under the first three clauses enumerated in the Revised Laws.[1426] This statute did not change the liability of directors, but merely left out the officers who were in nowise responsible for the management of the affairs of the corporation.[1427]

It will be noticed that the provisions of the section of the Revised Laws quoted above are now divided between sections 34 and 35 of the present act. Both under the Revised Laws and under the present act the president must be one of the directors,[1428] so that it would have been simpler not to have mentioned him at all. There is no provision requiring the treasurer to be a director, so that we have certain things in section 34 for which the treasurer and directors are liable, and certain things for which directors alone are liable under section 35.

It will be noticed that in the Revised Laws "other officers" than the president and directors are made liable in certain cases. Obviously this does not refer merely to the treasurer,

[1424] R. L., c. 110, § 58.
[1425] St. 1898, c. 266.
[1426] St. 1877, c. 230, § 1.
[1427] Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 564.
[1428] St. 1903, c. 437, § 18; R. L., c. 110, § 22.

because he is mentioned just above Now, in the present act, section 36, referring to the enforcement of liability, uses the general word "officer;" and section 17 says that the business of the corporation shall be "conducted by a president, a board of not less than three directors, a clerk, a treasurer, *and such other officers* . . . as the corporation by its by-laws shall authorize." Nevertheless the only liability put upon officers is that expressly mentioned in sections 34 and 35. One reason for this is probably that all statements and reports are to be made by the officers mentioned in these sections, so that they are the ones primarily responsible.

1. — Where debts exceeded capital.

This was one of the two classes of cases in which officers were formerly subjected to liability but which have been omitted from the present act.

Debts due from the corporation to a director were within this clause.[1429] Where a corporation was indebted to a firm for advances, and the firm was to repay itself out of goods in its hands, and did in fact receive a certain sum, it was held that the officers were not entitled to have the latter sum deducted from the former in determining by how much the debts exceeded the capital.[1430] A director who was a creditor was not allowed to share with other creditors who were not directors the amount which officers were compellable to pay, and an assignee of a firm, one member of which was a director and whose assets included a claim against the corporation, was held to stand no better than the firm.[1431]

It was held that a bill averring that at the time the plaintiff's claim accrued the debts of the corporation exceeded the amount of its capital by a certain sum, and that the defendants at the time the claim accrued were directors, did not show sufficiently that the excess happened in the administration of the defendant.[1432] And the officers were not personally liable

[1429] Thacher v. King, 156 Mass. 490, 31 N. E. Rep. 648.

[1430] Ibid.

[1431] Thacher v. King, 156 Mass. 490, 31 N. E. Rep. 648. See Thayer v. Union Tool Co., 4 Gray, 75, 79; Potter v. Stevens Machine Co., 127 Mass. 592, 593.

[1432] Merchants' Bank v. Stevenson, 5 Allen, 400.

where the excess of debts was caused by the payment of dividends by a voluntary assignee of the corporation.[1433]

The provisions of the Public Statutes did not prohibit a corporation from incurring an indebtedness in excess of its capital, but merely provided that if there was an excess on the day on which suit was brought the liability should exist, otherwise not.[1434]

Under St. 1870, c. 224, the liability of officers existed to the full amount of the excess of debts without reference to the amount of stock held by the directors, in this respect differing from the liability of the stockholders.[1435]

Under the Revised Statutes, a creditor could maintain a bill in equity against the officers without first recovering a judgment against the corporation.[1436] The remedies against directors and against the corporation were concurrent, as the directors might be liable for only one part of the debt and not for another.[1437] But a claim against directors could not be joined in one bill with a claim against the stockholders on the ground that the stock was not duly paid in and certified.[1438]

j. — For debts contracted before capital fully paid.

This was the second class of cases of liability dropped from the present law. This liability of officers corresponded with that imposed from early times upon stockholders.[1439] It was first imposed upon officers in 1898.[1440]

§ 35. Liability of directors in certain cases.[1441]

"The directors of every corporation shall be jointly and severally liable for the debts and contracts of the corporation in the following cases: —

[1433] Flint v. Boston Woven Hose, etc., Co., 183 Mass. 114. Cf. Merchants' Bank v. Stevenson, 10 Gray, 232, 235.

[1434] Flint v. Boston Woven Hose, etc., Co., 183 Mass. 114.

[1435] Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 564.

[1436] Rev. St., c. 38, § 25; Merchants' Bank v. Stevenson, 5 Allen, 400.

[1437] Merchants' Bank v. Stevenson, 5 Allen, 400.

[1438] Cambridge Water Works v. Somerville Dyeing, etc., Co., 14 Gray, 103.

[1439] See R. L., c. 110, § 59, supra, § 33, *m*.

[1440] St. 1898, c. 266.

[1441] As to certain general principles as to liability, see supra, § 33, *a*,

"First. For declaring or assenting to a dividend if the corporation is, or thereby is rendered, bankrupt or insolvent, to the extent of such dividend.

"Second. For debts contracted between the time of making or assenting to a loan to a stockholder or director and the time of its repayment, to the extent of such loan.

"Directors who vote against declaring said dividend or who vote against making said loan shall not be liable as aforesaid." [1442]

a. Dividends making the corporation bankrupt.

This provision originated in 1829.[1443]

The directors being the persons who have the right to decide whether or not a dividend shall be paid,[1444] it seems proper that they should be liable for an abuse of discretion, in the manner provided by the act. But directors are not liable for declaring a dividend when the corporation is not in fact insolvent and is not thereby made insolvent; although the payment of the dividends is one of the causes which ultimately results in the insolvency of the corporation.[1445] Dividends are payable only out of profits, and a corporation has no right to reduce its capital by declaring dividends payable therefrom.[1446]

Dissenting directors should insist upon a vote by ballot and a record of the same, in order that it may clearly appear that they did not assent to the declaring of the dividend.

A sale of all the property of the corporation, and the payment of the proceeds to a person who owns all the stock is, the payment of a dividend within the meaning of this section;[1447] and the directors, if the corporation is rendered thereby insolvent, cannot avoid liability by delegating to the president the

f, § 34, *a*, *b*. As to "debts and contracts," see supra, § 33, *g*, § 34, *c*. As to the history of liability, see supra, § 34, *g–j*.

[1442] St. 1903, c. 437, § 35; R. L., c. 110, § 58. For previous acts and for citations, see notes to preceding section.

[1443] St. 1829, c. 53, § 9; Rev. St., c. 38, § 23.

[1444] New York, etc., R. Co. v. Nickals, 119 U. S. 296; Gibbons v. Mahon, 136 U. S. 549; Belfast, etc., R. Co. v. Belfast, 77 Me. 445, 1 Atl. Rep. 362; McNab v. McNab, etc., Mfg. Co., 132 N. Y. 687, 31 N. E. Rep. 627.

[1445] Ellis v. French Canadian Co-op. Ass'n., 189 Mass. 566.

[1446] Field v. Lamson & Goodnow Mfg. Co., 162 Mass. 388, 38 N. E. Rep. 1126.

[1447] Penn. Iron Works v. Mackenzie, 190 Mass. 61.

power to carry out the vote, although the vote provides that sufficient funds shall be retained to pay the debts.[1448]

b. Loans to stockholders or directors.

The right to approve a loan rests with the directors, and it is therefore appropriate that they should take the responsibility for loans of this character. This provision originated in the act of 1829, which expressly forbade loans to stockholders.[1449] The modern general doctrine is that there is nothing to prevent dealings between a corporation and its stockholders, if the latter do not represent both sides of the transactions, and there is no fraud upon creditors or other stockholders.[1450] The directors, being necessarily the agents of the corporation, cannot so easily have dealings with the corporation which shall be free from suspicion, and must not vote on matters coming before their board in which they are personally interested.

The liability of a director for debts contracted between the time of a loan to a stockholder and its repayment is not provable against the estate of the director in bankruptcy, because it is not a debt of the bankrupt, and section 63b of the bankruptcy act of 1898 does not make it such.[1451] Therefore, as by section 17 of the bankruptcy act of 1898 the bankrupt is not released by a discharge, unless the claim is not only provable but also a debt, the discharge of a director after a creditor has obtained judgment against the corporation is not a bar to a bill to enforce the liability.[1452]

So, also, a director who has endorsed a note of the corporation, and been released in composition proceedings in bank-

[1448] Penn. Iron Works v. Mackenzie, 190 Mass. 61.

[1449] St. 1829, c. 53, § 8; Rev. St., c. 38, § 24.

[1450] 3 Clark & Marshall, Corp., §§ 633, *ff*. See supra, § 19, *d*.

[1451] Old Colony, etc., Co. v. Parker, etc., Co., 183 Mass. 557, 561. The rule was the same under the bankruptcy act of 1867, Fourth National Bank v. Francklyn, 120 U. S. 747, 754; James v. Atlantic Delaine Co., 13 Fed. Cas. 300, and under the state insolvent law, Bangs v. Lincoln, 10 Gray, 600; Lothrop v. Reed, 13 Allen, 294, 296. Cf. as to stockholders, supra, § 33, *f*.

[1452] Old Colony, etc., Co. v. Parker, etc., Co., 183 Mass. 557, 562; Barre National Bank v. Hingham Mfg. Co., 127 Mass. 563, 568.

ruptcy from his liability as endorser, is still liable on the note and for other debts of the corporation.[1453]

c. Right of contribution.

It will be noted that only those directors who do or assent to the doing of the two things specified in this section are made liable.

It would seem that these things are quite as much a positive wrong against the stockholders and creditors as the making of a false statement or certificate, and that under the principles discussed in connection with the latter, there can be no contribution.[1454]

§ 36. Enforcement of liability.

"A stockholder or officer in a corporation shall not be held liable for its debts or contracts unless it has been duly adjudicated bankrupt or unless a judgment has been recovered against it and it has neglected, for thirty days after demand made on execution, to pay the amount due, with the officer's fees, or to exhibit to the officer real or personal property belonging to it and subject to be taken on execution, sufficient to satisfy the same, and the execution has been returned unsatisfied.

"After such adjudication of bankruptcy or after the execution has been so returned, the clerk, or other officer who has charge of the records of such corporation, upon request of a creditor of the corporation or of his attorney, shall furnish to him a certified list of the names of all persons who were officers and stockholders in such corporation at the time when the liability to be enforced against them personally accrued. The supreme judicial court or the superior court shall have jurisdiction in equity to compel such list to be furnished. After an adjudication of bankruptcy or after the execution has been so returned, any creditor may file a bill in equity in the supreme judicial court or the superior court in behalf of himself and of all other creditors of the corporation, against it and all persons who are liable to the plaintiff as stockholders or officers for the recovery of the money due from the corporation to himself and to the other creditors for which the

[1453] Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563, 568.

[1454] See supra, § 34, *f*.

stockholders or officers may be personally liable by reason of any act or omission on the part of the corporation or any of the other defendants, setting forth the bankruptcy of the corporation, or the judgment and proceedings thereon, and the grounds upon which it is expected to charge the stockholders or officers personally." [1455]

[1455] St. 1903, c. 437, § 36; R. L., c. 110, §§ 60, 62; Pub. St., c. 106, § 62; St. 1870, c. 224, § 40; St. 1866, c. 290, § 10; St. 1862, c. 218, § 3; Gen. St., c. 60, § 34; St. 1852, c. 24; St. 1851, c. 315, § 3; Pub. St., c. 106, § 64; St. 1870, c. 224, § 42; St. 1866, c. 290, § 10; St. 1862, c. 218, § 4; Gen. St., c. 60, §§ 31, 32, 34; c. 68, § 17; St. 1852, c. 24; St. 1851, c. 315, §§ 1, 3; Rev. St., c. 38, §§ 29–31; c. 44, § 22; St. 1829, c. 53, § 11; St. 1826, c. 137, § 1; St. 1817, c. 183; St. 1808, c. 65, § 6.

Citations. — Pub. St., c. 106, § 62: George Woods Co. v. Storer, 144 Mass. 401, 11 N. E. Rep. 662; Chase's Elevator Co. v. Boston Tow-Boat Co, 152 Mass. 429; Thacher v. King, 156 Mass. 491, 31 N. E. Rep. 648; Clarke v. Warwick Cycle Mfg. Co., 174 Mass. 437, 54 N. E. Rep. 887; Train v. Marshall Paper Co., 180 Mass. 515, 62 N. E. Rep. 967.

St. 1870, c. 224, § 40: First Nat. Bank of Salem v. Almy, 117 Mass. 478; McRae v. Locke, 118 Mass. 269; Chamberlin v. Huguenot Mfg. Co., 118 Mass. 536; Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563; Thompson v. Bemis Paper Co., 127 Mass. 598.

St. 1862, c. 218, § 3: Peele v. Phillips, 8 Allen, 87; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394; Norfolk v. American Steam Gas Co., 103 Mass. 160; Norfolk v. American Steam Gas Co., 108 Mass. 407; Thayer v. New England Lithographic Co., 108 Mass. 523; Priest v. Essex Hat Mfg. Co., 115 Mass. 382; McRae v. Locke, 118 Mass. 270; Chamberlin v. Huguenot Mfg. Co., 118 Mass. 536.

Gen. St., c. 60, § 34: Cary v. Holmes, 2 Allen, 500; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 564.

St. 1851, c. 315, § 3: Denny v. Richardson, 4 Gray, 279; Bangs v. Lincoln, 10 Gray, 605; Dane v. Dane Mfg. Co., 14 Gray, 488; Dewey v. Baker, 16 Gray, 130; Lee v. Dearborn, 4 Allen, 165; Stone v. Fenno, 6 Allen, 581.

Pub. St., c. 106, § 64: Geo. Woods Co. v. Storer, 144 Mass. 401, 11 N. E. Rep. 662; Thacher v. King, 156 Mass. 494, 31 N. E. Rep. 648; Hudson v. J. B. Parker Machine Co., 173 Mass. 247, 53 N. E. Rep. 867.

St. 1870, c. 224, § 42: First Nat. Bank of Salem v. Almy, 117 Mass. 478; McRae v. Locke, 118 Mass. 269; Chamberlin v. Huguenot Mfg. Co., 118 Mass. 536; Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563; Burnap v. Haskins Steam Engine Co., 127 Mass. 586; Thompson v. Bemis Paper Co., 127 Mass. 595, 598.

St. 1862, c. 218, § 4: Peele v. Phillips, 8 Allen, 87; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394; Norfolk v. American Steam Gas Co., 103 Mass. 161; Thayer v. New England Lithographic Co., 108 Mass. 523; Moore v. Reynolds, 109 Mass. 473; Pope v. Leonard, 115 Mass. 286; Priest v. Essex Hat Mfg. Co., 115 Mass. 382; Nickerson v. Wheeler, 118 Mass. 298; Potter v. Stevens Machine Co., 127 Mass. 593.

Gen. St., c. 60, § 31: Cambridge Water Works v. Somerville Dyeing &

a. Construction of the statute.

The present form of this section dates substantially from 1870.

The liability under this section, being statutory, is to be strictly construed, and cannot be carried beyond the conditions precedent in the form in which they are expressed,[1456] and proceedings to charge officers and stockholders must follow the statute strictly.[1457]

The present act expressly preserves any right to enforce

Bleaching Co., 4 Allen, 243; Bond v. Morse, 9 Allen, 472; Newcomb v. Reed, 12 Allen, 365; Cochrane v. Reed, 13 Allen, 456; Norfolk v. American Steam Gas Co., 108 Mass. 404; McRae v. Locke, 114 Mass. 96; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 564.

Gen. St., c. 60, § 32: Cary v. Holmes, 2 Allen, 500; Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 4 Allen, 243; Norfolk v. American Steam Gas Co., 108 Mass. 407; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 564.

Gen. St., c. 60, § 34: Cary v. Holmes, 2 Allen, 500; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 564.

Gen. St., c. 68, § 17: Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 4 Allen, 244; Cochrane v. Reed, 13 Allen, 456; Byers v. Franklin Coal Co., 106 Mass. 131; Thayer v. New England Lithographic Co., 108 Mass. 526; McRae v. Locke, 118 Mass. 269.

St. 1851, c. 315, § 1: Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. 576; Farnum v. Ballard Vale Machine Shop, 12 Cush. 508; Denny v. Richardson, 4 Gray, 278; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray, 216; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 563.

Rev. St., c. 44, § 22: Stedman v. Eveleth, 6 Met. 126.

Rev. St., c. 38, §§ 29, 31: Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 563.

St. 1829, c. 53, § 11: Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 4 Allen, 293; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 564.

St. 1826, c. 137, § 1: Bordman v. Osborn, 23 Pick. 295.

St. 1817, c. 183: Leland v. Marsh, 16 Mass. 392; Marcy v. Clark, 17 Mass. 335; Andrews v. Callender, 13 Pick. 484; Stone v. Wiggin, 5 Met. 319; Gray v. Coffin, 9 Cush. 199; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

St. 1808, c. 65, § 6: See Proprietors of Mills v. Com., 164 Mass. 232, 41 N. E. Rep. 280.

See also, generally, Knowlton v. Ackley, 8 Cush. 93; Bell v. Spaulding, 3 Allen, 485; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 559; Graves v. Morgan, 182 Mass. 161.

[1456] Train v. Marshall Paper Co., 180 Mass. 513, 515, 62 N. E. Rep. 967.

[1457] Chamberlin v. Huguenot Mfg. Co., 118 Mass. 536; Priest v. Essex Mfg. Co., 115 Mass. 380.

the liability of stockholders or officers vested before its passage,[1458] and a bill will lie to enforce such a right though not filed until after the present act took effect.[1459]

b. "Debts and contracts."

As to this subject, see supra, § 33 g, § 34 c.

c. Bankruptcy of the corporation.[1460]

The present bankruptcy act of 1898 applies to involuntary petitions against corporations engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over.[1461] Under it a decision was made that a judgment

[1458] Supra, § 2; infra, § 96.

[1459] So held as to St. 1870, c. 224. Pope v. Salamanca Oil Co., 115 Mass. 286, 291.

[1460] Cf. supra, § 33, *f*.

[1461] Act of July 1, 1898, c. 541, §§ 1, 2, 4; Act of Feb. 9, 1903, c. 487.

See Re Bates Machine Co., 91 Fed. Rep. 625; Re Marine Mach., etc., Co., 91 Fed. 630, as to petitions filed at the instance of the corporation.

The right to file a petition depends upon what is the business of the corporation at the time of filing, Re Minnesota, etc., Construction Co., 60 Pac. Rep. 881 (Ariz.); and does not depend upon the terms of the charter. Re Tontine Surety Co., 116 Fed. Rep. 401.

Corporations engaged in the following pursuits have been held not subject to the act: Carrying goods and passengers by water, Re Philadelphia, etc., Transportation Co., 114 Fed. Rep. 403; social clubs doing incidental trading, Re Fulton Club, 113 Fed. Rep. 997; the restaurant and saloon business, Re Chesapeake, etc., Oyster Co., 112 Fed. Rep. 960; giving theatrical exhibitions, Re Oriental Society, 104 Fed. Rep. 915; construction companies, Re Minnesota, etc., Constr. Co., 60 Pac. Rep. 881 (Ariz.); water-supply companies, Re New York, etc., Water Co., 98 Fed. Rep. 711, 102 Fed. Rep. 1004. See Re San Gabriel Sanatorium Co., 95 Fed. Rep. 271.

The following have been held to be within the act: A boarding stable company, Re Morton Boarding Stables, 108 Fed. Rep. 791; a mercantile agency, Re Mutual Mercantile Agency, 111 Fed. Rep. 152; but see Zugalla v. Agency, 142 Fed. Rep. 927; a smelting company, and a timbering company, Re Chandler, 1 Lowell (U. S.) 478; Re Cowles, Fed. Cas. No. 3,297; a paper company, although its mills were never operated, White Mountain Paper Co. v. Morse, 127 Fed. Rep. 643; a laundry company, Re Troy Steam Laundering Co., 132 Fed. Rep. 266; a ship building company, Columbia Iron Works v. National Lead Co., 127 Fed. Rep. 99.

See generally People v. Roberts, 145 N. Y. 377; Re Cameron, etc., Ins. Co., 96 Fed. Rep. 756; Philpot v. O'Brion, 126 Fed. Rep. 167.

against a corporation after it had obtained its discharge was not such a judgment as could be the basis for a bill to enforce personal liability.[1462]

In consequence of this decision, the present act makes bankruptcy of the corporation an independent ground for bringing a bill, and it will be observed that the *adjudication of bankruptcy* is sufficient for this purpose. Therefore a creditor can proceed directly to enforce liability in such a case for the full amount of his debt, and is not obliged to prove his claim against the estate of the corporation, or to obtain a judgment against the corporation, before proceeding in equity.

Having once obtained jurisdiction in equity by virtue of the adjudication of the bankruptcy of the corporation, the pendency of such bankruptcy proceedings cannot be set up as a defence by the stockholders or officers.[1463] Nor is it a defence that the bankruptcy existed at the date of the demand upon execution,[1464] or that the plaintiff proved his claim in the bankruptcy proceedings, and received a dividend thereon.[1465]

d. Bankruptcy of stockholders or officers.

As we have seen, the discharge in bankruptcy of stockholders or officers under proceedings begun before the commencement

[1462] Train v. Marshall Paper Co., 180 Mass. 513, 62 N. E. Rep. 967.

Historical. Under the bankruptcy act of 1867, and the state insolvent law, a corporation was not entitled to a discharge, and the bankruptcy and insolvency of the corporation and proof of the plaintiff's claim therein did not prevent his getting a judgment for the balance, which could be the basis of a bill to enforce personal liability.

Clarke v. Warwick Cycle Mfg. Co., 174 Mass. 437, 54 N. E. Rep. 887; Coburn v. Boston Papier Maché Mfg. Co., 10 Gray, 243; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray, 216, 218; Chamberlin v. Huguenot Mfg. Co., 118 Mass. 532, 536; Folger v. Columbian Insurance Co., 99 Mass. 267; Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563.

So also it was no defense to a bill that, after the commencement of the action at law on which the bill was founded, the corporation made an assignment for the benefit of creditors. Hudson v. J. B. Parker Machine Co., 173 Mass. 242.

[1463] Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563. See U. S. Act of Feb. 9, 1903, c. 487, § 3.

[1464] Ibid.

[1465] Ibid.

of the action against the corporation and before the bill is filed under this section is no defence.[1466]

e. Judgment against the corporation.

As soon as a corporation is properly organized, it becomes and continues to be subject to suits to enforce its debts.[1467] "Evidently the judgment in contemplation is one which will establish a debt and will warrant a legally effective execution." [1468] Therefore a judgment against the corporation, after it had obtained its discharge in bankruptcy and before the bankruptcy clause in the wording of the present act was adopted, imposing no liability upon the corporation, was held not to satisfy the statute, and it was held that it ought not to be entered.[1469] Recovery of judgment in *scire facias* against a corporation charged in the original suit as trustee of a debt owing by it, and for which its officers are liable, is a sufficient recovery of judgment to render officers liable in a bill filed by the original creditor and the plaintiff in *scire facias*.[1470]

The judgment against the corporation is conclusive of the existence of the debt for which it was rendered, in proceedings to enforce liability.[1471]

[1466] Supra, § 33, *f*, § 34, *b*, § 35, *b*.

[1467] Chamberlin v. Huguenot Mfg. Co., 118 Mass. 536; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385; First Nat. Bank of Salem v. Almy, 117 Mass. 476.

[1468] Train v. Marshall Paper Co., 180 Mass. 513, 62 N. E. Rep. 967, per Holmes, C. J. St. 1862, c. 218, § 3, requiring a judgment as precedent to personal liability, applied both to corporations under general laws and under special charters. Peele v. Phillips, 8 Allen, 89.

[1469] Train v. Marshall Paper Co., 180 Mass. 513, 62 N. E. Rep. 967. Cf. Coburn v. Papier Maché Mfg. Co., 10 Gray, 243; Pub. St., c. 157, § 135. Also Re Marshall Paper Co., 102 Fed. Rep. 872, 874, 95 Fed. Rep. 419; Loring v. Eager, 3 Cush. 188.

[1470] Norfolk v. American Steam Gas Co., 103 Mass. 160.

[1471] (Cases under St. 1862, c. 218): Thayer v. N. E. Lithographic Co., 108 Mass. 523; Gaskill v. Dudley, 6 Met. 564; Lane v. School District, 10 Met. 462; Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. 576; Farnum v. Ballardvale Machine Shop, 12 Cush. 507; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray, 216; Norfolk v. American Steam Gas Co., 108 Mass. 404; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 557. See also Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 397, and infra, § 39.

As above noted, on a bill by creditors to enforce the liability of the officers the plaintiffs may prove not only their judgment debt, but a further sum due on simple contract.[1472] And a judgment against the corporation on a simple contract debt does not merge the debt so as to extinguish the liability of officers therefor.[1473]

Provisions in the earlier statutes to the effect that the corporation should not do business until the whole of the capital stock was paid in, and a certificate filed, did not prevent a judgment against the corporation upon a debt contracted before the filing of the certificate.[1474]

Where an execution issues against a corporation, the sheriff is not entitled under it to arrest an officer or member of the corporation.[1475]

f. Demand for amount due.

If a corporation has a manufactory in one county and its usual place of business in another, a demand made in the latter county is sufficient, if the meetings of the stockholders and directors are held and the official records are kept in the latter county; and if the blanks used by the corporation have a printed heading giving the name and number of a street of a city in the county where the treasurer has transacted his private business, this will warrant a finding that the corporation has a usual place of business there.[1476]

As previously noted, proceedings must be in strict accordance with the statute, and therefore a return of the execution unsatisfied, on the same day on which a demand was made, is not a good foundation for a bill, and it is not helped by evidence that the corporation neglected to pay the debt, made no attempt to exhibit property, and had no property to exhibit.[1477]

[1472] Thacher v. King, 156 Mass. 490, 31 N. E. Rep. 648.

[1473] Byers v. Franklin Coal Co., 106 Mass. 131.

[1474] First Nat. Bank of Salem v. Almy, 117 Mass. 478; Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 283, 111 Mass. 200; Priest v. Essex Hat Mfg. Co., 115 Mass. 380; Pollard v. Bailey, 20 Wall. 520.

[1475] Nichols v. Thomas, 4 Mass. 232.

[1476] Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563.

[1477] Priest v. Essex Hat Mfg. Co., 115 Mass. 380.

The "amount due," which must be paid to discharge the personal liability, includes costs, but not costs in collateral suits for debts not due from the corporation to the plaintiff.[1478]

g. Discovery of stockholders and officers.

The statute provides for discovery, from the clerk or officer having charge of the records, of the names of those who were stockholders and officers at the time when the liability to be enforced against them personally accrued.

As regards foreign corporations whose officers and records are within the State, a bill for discovery will lie here in aid of a bill to enforce personal liability in the chartering State, if a judgment has been recovered against the corporation there.[1479]

h. Remedy in equity — Nature of remedy.

The remedy given by the statute is the only remedy, and is to be pursued only for the equal benefit of all the creditors who may seek to enforce their rights.[1480] "The liability does not rest upon equity, but is of strict statute imposition. The remedy is given in equity for the sake of the greater convenience and advantage it affords for the adjustment of the various interests of the several parties who may join or be joined as plaintiffs or defendants." [1481]

"The mode provided by law for the enforcement of the liability of the officers is in the nature of a suit upon a contract; all are to be joined in the suit, and the creditor cannot single out and elect only one, as he may among trespassers. . . . In substance, the remedy provided is also in contract. The officers are not held to compensate a creditor only for the injury which he has sustained, which would be their liability in an action of tort. They are treated as assuming the respon-

[1478] Norfolk v. American Steam Gas Co., 108 Mass. 404; Burnap v. Haskins Steam Engine Co., 127 Mass. 586.

[1479] Post v. Toledo, etc., R. Co., 144 Mass. 341.

[1480] George Woods Co. v. Storer, 144 Mass. 399, 11 N. E. Rep. 662; First Nat. Bank of Salem v. Almy, 117 Mass. 478.

[1481] Priest v. Essex Hat Mfg. Co., 115 Mass. 380, 382, per Wells, J.; Moore v. Reynolds, 109 Mass. 473.

sibility of the contract made by him with the corporation. . . ." [1482]

The appointment of a receiver in the United States court is not fatal to this proceeding, where he comes in and submits himself to the jurisdiction of the State court, for the liability is no part of the assets of the corporation.[1483]

i. — Who may bring bill.[1484]

Creditors who are also stockholders or officers of the corporation are not entitled to the remedy provided by this section.[1485]

Thus, as to the liability of officers, the court has said: "To say that the officers may come within one or more of these cases [of persons entitled to the remedy] would be to say that they may be jointly and severally liable to themselves. It would seem plain that the debts and contracts for which the officers of a corporation were liable under the statute were the the debts and contracts other than those due to or made with themselves. The officers are on one side, and the other creditors are on the other, and it is to them, and for their security alone, that the officers are made liable." [1486]

It seems, however, that a mere equitable interest in shares would not debar a creditor from suing under this section.[1487]

j. — Parties.

The bill must be brought by a creditor "on behalf of himself and all other creditors." If this is not done, the bill will abate, except as provided in section 37 of the act.[1488]

A bill may be brought by two or more creditors in behalf of themselves and all other creditors, and a prayer that the de-

[1482] Nickerson v. Wheeler, 118 Mass. 298.

[1483] Am. Steel & Wire Co. v. Bearse, 194 Mass. 596.

[1484] See also supra, § 33, *b*.

[1485] Thacher v. King, 156 Mass. 490; Potter v. Stevens Machine Co., 127 Mass. 592; Thompson v. Bemis Paper Co., 127 Mass. 595; Thayer v. Union Tool Co., 4 Gray, 75.

[1486] Thacher v. King, 156 Mass. 490, 494, per Morton, J.

[1487] See Thompson v. Bemis Paper Co., 127 Mass. 595; Johnson v. Somerville, etc., Co., 15 Gray, 216; Crease v. Babcock, 10 Met. 525.

[1488] Moore v. Reynolds, 109 Mass. 473.

fendants be ordered "to pay to the plaintiffs and to such other creditors as may become parties to the bill" the amounts due, is not repugnant to the bill so framed.[1489]

Non-joinder of other creditors was formerly not excused by an allegation in the bill that there were no other creditors known to the plaintiff,[1490] but it seems that under section 37 of the present act the result might be different.

The corporation itself is a necessary party to such a bill, and was under earlier statutes.[1491]

Where the stock has not been divided or certificates issued to stockholders, a bill describing the defendants as "members of and stockholders in said corporation, holding the same undivided" is sufficient to charge the stockholders.[1492]

Where an infant is defendant, no guardian *ad litem* need be appointed, if there is a probate guardian, unless the interests of the infant and the probate guardian conflict.[1493]

k. — Pleading.[1494]

A claim against directors as such cannot be included in a bill in equity against them and others as stockholders, for such a bill is multifarious;[1495] but a bill may be maintained against officers although it alleges various grounds of liability,[1496] and the same principle applies to a bill against stockholders.

Where there are two bills pending against the same persons,

[1489] Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563.

[1490] Pope v. Leonard, 115 Mass. 286.

[1491] Pope v. Leonard, 115 Mass. 286; Deerfield v. Nims, 110 Mass. 115. Cf. Lyman v. Bonney, 101 Mass. 562. Under Rev. St., c. 38, § 3, a creditor could not proceed in equity against stockholders who were not officers until a judgment at law against the corporation, even though the corporation had been made a party defendant. Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 4 Allen, 243.

[1492] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385.

[1493] Mansur v. Pratt, 101 Mass. 60.

[1494] Cf. infra, § 37.

[1495] Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 564; Pope v. Leonard, 115 Mass. 286; Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 14 Gray, 190.

[1496] Pope v. Salamanca Oil Co., 115 Mass. 290. In this case the grounds alleged were, (1) failure to make and file the certificate that the capital had been paid in, required by Gen. St., c. 60, § 18; (2) failure to file annual certificate of condition, required by St. 1862, c. 210; (3) for excess of debts over capital at the time of commencing suit.

one to charge them as directors on one ground, and the other to charge them as stockholders on another ground, the pendency of either bill is no defence to the other.[1497]

A bill is not multifarious because it adds to the officers, as parties respondent, the assignees of the corporation for the benefit of creditors and seeks to charge the funds held by them.[1498]

The bill need not allege the par value of the shares,[1499] but should aver that a judgment has been recovered against the corporation,[1500] or that there has been an adjudication of bankruptcy.

On a bill in equity the plaintiffs may prove not only the judgment debt, but a further sum due on simple contract,[1501] for "even if it be necessary that the plaintiff bringing the bill should have recovered the judgment, which the statute does not say, still the benefit of the bill is not confined to judgment creditors, and if other simple contract creditors can join them there is no reason why the plaintiffs should not join their claims of like nature.[1502]

A plaintiff will not be allowed to amend his bill after a demurrer has been sustained, and after his demand is barred by the statute of limitations, if he has been guilty of laches in the prosecution of his suit and in applying for leave to file an amendment.[1503]

In one case it was held that a bill filed June 6, 1873, alleging a judgment recovered July 17, 1868, which was returned unsatisfied September 12, 1868, was not open to the objection of laches.[1504] It is also no defence to a bill under this section that some of the defendants have paid the plaintiffs other sums due, and have a claim for contribution upon the other defendants.[1505]

1497 Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563.
1498 Hudson v. J. B. Parker Machine Co., 173 Mass. 242, 249.
1499 Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385.
1500 McRae v. Locke, 118 Mass. 269.
1501 Thacher v. King, 156 Mass. 490, 31 N. E. Rep. 648.
1502 Ibid, p. 493, per Morton, J.
1503 Merchants' Bank v. Stevenson, 7 Allen, 489.
1504 Pope v. Salamanca Oil Co., 115 Mass. 286.
1505 Burnap v. Haskins Steam Engine Co., 127 Mass. 586.

On a bill under this section proper decrees may be entered against the respective parties, according to their several liabilities.[1506] The defendants are jointly and severally liable for costs;[1507] but where the corporation has been charged in trustee process, and the plaintiff in that process has recovered judgment against the corporation in *scire facias*, the costs in the latter proceeding cannot be recovered from the defendants in the suit in equity.[1508]

l. — Evidence.

Parol evidence is admissible in connection with the record of a judgment against the corporation to identify the debt and to show when it was contracted.[1509]

In proving the existence of the corporation, it will be recalled that section 12 of the present act provides that such existence "shall begin upon the filing of the articles of organization in the office of the secretary of the commonwealth," and that the secretary's record of the certificate or a copy thereof or the certificate itself shall be conclusive evidence of the existence of the corporation. The statute does not say, however, that the filing of the articles cannot be proved in some other way; and in one case, under earlier acts, it was held that proof that the articles were sworn to and filed, that the association engaged in business in its corporate name, contracted debts and filed other certificates required by law, was conclusive as against officers who had sworn to and filed the papers.[1510]

It is, however, necessary to prove corporate existence in some fashion,[1511] and it is open to the stockholders to show that the organization was defective unless the conclusive evidence of the corporation's existence is forthcoming.[1512]

[1506] Peele v. Phillips, 8 Allen, 87.

[1507] Burnap v. Haskins Steam Engine Co., 127 Mass. 586; Norfolk v. American Steam Gas Co., 108 Mass. 404; Crease v. Babcock, 10 Met. 525, 568.

[1508] Norfolk v. American Steam Gas Co., 108 Mass. 404.

[1509] Norfolk v. American Steam Gas Co., 108 Mass. 404.

[1510] Priest v. Essex Hat Manuf. Co., 115 Mass. 380 (decided under Gen. St., c. 61, § 8). See also First Nat. Bank v. Almy, 117 Mass. 476 (decided under St. 1870, c. 224).

[1511] Utley v. Union Tool Co., 11 Gray, 139.

[1512] Ibid.

m. History of the remedy.

Under the Revised Statutes,[1513] it was provided that any one entitled to an action against officers liable to pay debts might have an action on the case. But this was found to operate so inequitably and to create so much confusion that the court compelled creditors to resort to a bill in equity,[1514] and although the same provision was retained in the General Statutes, probably by inadvertence,[1515] it was repealed in 1862.[1516] The theory of compelling the creditors to go into equity was, that the liability of the directors was a limited one, extending only to the excess of corporate debts over capital actually paid in, and as this excess might be less than the claims of creditors having a right to such a remedy against the directors, it was necessary to have all the creditors brought in to have the excess apportioned.[1517]

"By the St. of 1862, c. 210, the certificates there required were to be filed by the officers of every corporation organized under the Gen. St., c. 61, to which class the corporation of which the defendants are directors belongs; and by the St. of 1863, c. 246, § 2, it was provided that officers neglecting or refusing to file such certificates 'shall be jointly and severally liable for all debts of the corporation contracted during the continuance of such violation, refusal or neglect.' Neither of these statutes provided for any form of remedy, but left that to the existing laws. The St. of 1862, c. 218, § 3, had provided an appropriate remedy to enforce any liability which might be incurred by such violation, refusal or neglect on the part of the officers of manufacturing corporations, and required that, before such liability could be enforced, a judgment should be recovered upon the debt sued for against the corporation itself. But as the St. of 1862, c. 218, applied only to manufacturing

[1513] Rev. St., c. 38, § 29, re-enacted as Gen. St., c. 60, § 31. Cf. St. 1829, c. 53, § 11.

[1514] Merchants' Bank v. Stevenson, 10 Gray, 232; Kinsley v. Rice, 10 Gray, 325.

[1515] Cochrane v. Reed, 13 Allen, 455.

[1516] St. 1862, c. 218, § 10; Bond v. Morse, 9 Allen, 472; Peele v. Phillips, 8 Allen, 86.

[1517] Merchants' Bank v. Stevenson, 5 Allen, 400.

corporations (Byers v. Franklin Coal Co., 106 Mass. 131, 134), the remedy against officers of mining corporations provided by the Gen. St., c. 68, § 17, was in no way affected by it, and continued to be the appropriate remedy until the passage of the St. of 1870, c. 224. The St. of 1870, by its terms, embraces mining as well as manufacturing corporations, and contains the general provision that no stockholder or officer shall be liable for the debts of the corporation unless a judgment therefor shall be recovered against the corporation, and the execution thereon returned unsatisfied, and further provides, after such return, for a remedy by bill in equity against such officers as may be liable. St. of 1870, c. 224, §§ 40, 42. Adopting the reasoning of the court in Thayer v. New England Lithographic Co., 108 Mass. 523, in considering the remedy provided against officers of manufacturing corporations by the St. of 1862, c. 218, § 3, while the remedy provided by this statute is not declared to be in place of or in addition to that allowed by the Gen. St., c. 68, § 17, it is full and complete, and its association indicates that the successive steps were intended to constitute one entire mode of remedy, which is exclusive of all others. It would be necessary for the plaintiff, therefore, in order to maintain his bill, to show that a judgment had been recovered against the corporation, and that the other proceedings required by the St. of 1870 had been taken. Nor is this affected by the St. of 1870, c. 224, § 69, which, in repealing the St. of 1862, c. 210, and the St. of 1863, c. 246, under which the claim of the plaintiff is made, enacts that 'this repeal shall not impair any right already acquired or liability incurred under existing laws.' The plaintiff had not commenced his proceeding to avail himself of the rights which he had acquired, if any, or to enforce the liabilities which the defendants had incurred by any neglect of duty on their part at the time the St. of 1870, c. 224, was passed. These rights and liabilities remain as before; but in seeking to enforce his remedy subsequently to the passage of that statute the plaintiff must pursue the course there prescribed." [1518]

[1518] McRae v. Locke, 118 Mass. 269, 270, per Devens, J.

Most of the successive enactments in regard to remedies against stockholders and officers expressly provided that the repeal of previous laws should not impair rights already acquired or liabilities incurred under existing laws.[1519]

§ 37. Procedure.[1520]

"Such suit shall not be discontinued by the plaintiff except by order of the court after notice to other creditors. It shall not abate by reason of the non-joinder of persons liable as defendants, unless the plaintiff, after notice by plea or answer of their existence, unreasonably neglects to make them parties; nor shall it abate by reason of the death of a defendant, but his estate shall be liable in the hands of his executor or administrator, who may voluntarily appear, or who may be summoned by the plaintiff, to defend the suit." [1521]

The non-joinder of all the stockholders or officers, even though apparent on the face of the bill, must be taken by plea or answer and not by demurrer.[1522]

The provision in this section as to survival of liability is declaratory of the previous law.[1523]

§ 38. Apportionment of assessment.

"Such sums as may be decreed to be paid by the stockholders in such suit shall be assessed upon them in proportion to the

[1519] Chamberlin v. Huguenot Mfg. Co., 118 Mass. 536; Thayer v. N. E. Lithographic Co., 108 Mass. 523.

[1520] Cf. supra, § 36, *k*.

[1521] St. 1903, c. 437, § 37; R. L., c. 110, §§ 65–67; Pub. St., c. 106, §§ 67–69; St. 1870, c. 224, §§ 45–47; St. 1862, c. 218, §§ 7–9.

Citations. — Pub. St., c. 106, §§ 67–69: Hudson v. J. B. Parker Machine Co., 173 Mass. 247, 53 N. E. Rep. 867.

St. 1870, c. 224, §§ 45–47: First Nat. Bank of Salem v. Almy, 117 Mass. 478.

St. 1862, c. 218, § 9: Essex Co. v. Lawrence Machine Shop, 10 Allen, 352.

See also, generally, Warren v. Para Rubber Shoe Co., 166 Mass. 97, 104, 44 N. E. Rep. 112.

[1522] Essex Company v. Lawrence Machine Shop, 10 Allen, 352. As to non-joinder of defendants, see also, supra, § 36, *j*.

[1523] Hudson v. J. B. Parker Machine Co., 173 Mass. 247, 53 N. E. Rep. 867. Cf. Warren v. Para Rubber Shoe Co., 166 Mass. 97, 104 .

amounts of stock held by them respectively at the time when their liability accrued; but a stockholder shall not be liable to pay a larger amount than the amount of stock held by him at that time at its par value as fixed at the time when the liability to be enforced against him personally accrued." [1524]

This section is similar to the corresponding provision of the Revised Laws.[1525]

The liability, subject to the limitation in this section, extends to all the debts of the corporation; [1526] and, where the stock has not been divided into shares, it seems that the stockholders are liable equally.[1527]

Stockholders are, however, not liable to any additional extent where some of the shares have never been issued,[1528] and it seems that the same rule would apply where stock has been purchased by the corporation.

§ 39. Defense of actions by stockholders or officers.

"If, in an action against a corporation, it appears to the court that one of the purposes of the action is to obtain a judgment against the corporation in order to enforce an alleged liability of a person who has been or is a stockholder or officer thereof, such stockholder or officer may be permitted, on petition, to defend such action, and the court may require of him, or of a person in his behalf, a bond with sufficient surety or sureties conditioned

[1524] St. 1903, c. 437, § 38; R. L., c. 110, § 63; Pub. St., c. 106, § 65; St. 1870, c. 224, § 43; St. 1862, c. 218, § 5.

Citations. — St. 1870, c. 224, § 43: First Nat. Bank of Salem v. Almy, 117 Mass. 478; Thompson v. Bemis Paper Co., 127 Mass. 598.

St. 1862, c. 218, § 5: Peele v. Phillips, 8 Allen, 87; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 394.

See also, generally, Cary v. Holmes, 16 Gray, 127; Burnap v. Haskins Steam Engine Co., 127 Mass. 586, 590; Potter v. Stevens Machine Co., 127 Mass. 592.

[1525] *Historical.* As to the law before 1862, see supra, § 33, *l*, *m*. Under the Revised Statutes, stockholders were liable for the entire debts in proportion to the shares held by solvent stockholders within the jurisdiction of the court. Cary v. Holmes, 16 Gray, 127.

[1526] Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563, 566.

[1527] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 397. Cf. s. c., 111 Mass. 200.

[1528] Crease v. Babcock, 10 Met. 525, 556.

to pay to the plaintiff all costs which may accrue and be taxed to him after the filing of said petition."[1529]

a. Conclusiveness of judgment.

Both before and since the act allowing stockholders or officers to defend a suit against the corporation, if for any reason such suit is not defended and the corporation is defaulted, the judgment so obtained is conclusive and is binding upon the other parties.[1530] Therefore a director cannot show in defence, after a trial has once been had, that when judgment was rendered he was absent from the Commonwealth, and had no knowledge of the proceedings, and that the corporation had a good defence when judgment was obtained against it by default. He takes his chances of such an event when he becomes a director.[1531]

b. Historical.

This section is the same as in the Revised Laws. Formerly there was no right to defend on behalf of the corporation.[1532]

"Originally the property of every stockholder might be directly levied on to satisfy an execution on a judgment against a domestic corporation of which he was a member. No oppor-

[1529] St. 1903, c. 437, § 39; R. L., c. 110, § 68; Pub. St., c. 106, §§ 70, 71; St. 1870, c. 224, §§ 48, 49; St. 1867, c. 36, §§ 1, 2.

Citations. — Pub. St., c. 106, § 70: Old Colony, etc., Co. v. Parker, etc., Co., 183 Mass. 563.

St. 1867, c. 36, § 1: Byers v. Franklin Coal Co., 14 Allen, 472; Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 564, 568; St. 1867, c. 36, § 2, ibid.; St. 1870, c. 224, § 48, ibid.

See also, generally, Johnson v. Somerville, etc., Co., 15 Gray, 216.

[1530] Cases against stockholders: Gaskill v. Dudley, 6 Met. 546; Holyoke Bank v. Goodman Paper Co., 9 Cush. 576; Lane v. School District, 10 Met. 462; Farnum v. Ballardvale Machine Shop, 12 Cush. 508; Johnson v. Somerville, etc., Co., 15 Gray, 216; Thayer v. New England Lithographic Co., 108 Mass. 523, 528; Norfolk v. American Steam Gas Co., 108 Mass. 404, 406. Case against a director: Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 557, 568.

[1531] Old Colony, etc., Co. v. Parker, etc., Co., 183 Mass. 557.

[1532] Byers v. Franklin Coal Co., 14 Allen, 470; Old Colony, etc., Co. v. Parker, etc., Co., 183 Mass. 557; Hobbs v. Dane Manuf. Co., 5 Allen, 581; Holyoke Bank v. Goodman Paper Manuf. Co., 9 Cush. 576, 582. Cf. Robbins v. Justices, 12 Gray, 225, holding that a stockholder had no right to remove an action to a higher court.

tunity was given him to appear or contest this liability until St. 1851, c. 315, § 1, re-enacted in Gen. St., c. 60, § 32, that for the first time provided that when a corporation was sued a summons was to be left with the stockholder, if it was sought to charge him with the payment of the debt in suit. By § 2 there was but one trial, at which two issues were presented: indebtedness of the corporation to the plaintiff and the ultimate liability of the stockholder to pay. But the stockholders' defence was limited to showing that he was not liable for the debt, and he could not be heard to contest the issue between the corporation and the plaintiff." [1533]

G. AMENDMENTS AFTER ORGANIZATION.

§ 40. Changes in agreement of association and articles of organization.

"Every corporation may, at a meeting duly called for the purpose, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, authorize an increase [1534] or a reduction [1535] of its capital stock and determine the terms and manner of the disposition of such increased stock, may authorize a change of the location of its principal office or place of business in this commonwealth [1536] or a change of the par value of the shares of its capital stock, or may authorize proceedings for its dissolution under the provisions of section fifty-one.[1537]

"It may, at a meeting duly called for the purpose, by the vote of two-thirds of all its stock, or, if two or more classes of stock have been issued, of two-thirds of each class of stock outstanding and entitled to vote, or by a larger vote if the agreement of association so requires, change its corporate name,[1538] the nature of its business,[1539] the classes of its capital stock subsequently to be issued and their voting power, or make any other lawful amendment or alteration in its agreement of association or

[1533] Old Colony, etc., Shoe Co. v. Parker, etc., Co., 183 Mass. 557, 564, per Braley, J.

[1534] Cf. R. L., c. 109, § 29; c. 110, §§ 31, 34.

[1535] Cf. R. L., c. 110, § 31.

[1536] Cf. R. L., c. 109, § 7.

[1537] Cf. R. L., c. 109, § 52.

[1538] Cf. R. L., c. 109, §§ 9–11.

[1539] Cf. R. L., c. 110, § 47.

articles of organization, or sell, lease or exchange all its property and assets, including its good will and its corporate franchise, upon such terms and conditions as it deems expedient." [1540]

[1540] St. 1903, c. 437, § 40; R. L., c. 109, §§ 7, 29, 52; c. 110, §§ 31, 34, 47; St. 1902, c. 441; Pub. St., c. 105, § 7; St. 1877, c. 67; Pub. St., c. 105, § 20; St. 1871, c. 109; c. 392, § 4; St. 1870, c. 179; Pub. St., c. 105, § 40; Gen. St., c. 68, § 35; St. 1852, c. 55, §§ 1, 3; St. 1899, c. 199, § 2; Pub. St., c. 13, § 43; c. 106, § 34; St. 1875, c. 177, § 3; St. 1873, c. 39, § 2; St. 1871, c. 110, § 2; St. 1870, c. 224, § 24; St. 1866, c. 290, § 5; St. 1865, c. 283, § 8; Gen. St., c. 60, §§ 11, 21; c. 61, § 6; St. 1857, c. 24; St. 1855, c. 478, § 5; St. 1851, c. 133, § 8; Rev. St., c. 38, §§ 11, 20; St. 1829, c. 53, §§ 3, 10; Pub. St., c. 106, § 37; St. 1877, c. 230, § 3; St. 1871, c. 109; St. 1870, c. 179; St. 1885, c. 310; Pub. St., c. 106, § 51; St. 1875, c. 177, § 4.

Citations. — Pub. St., c. 105, § 20: Pratt v. American Bell Telephone Co., 141 Mass. 228, 5 N. E. Rep. 307; Smith v. Franklin Park Land, etc., Co., 168 Mass. 349, 47 N. E. Rep. 409.

St. 1871, c. 392, § 4: Rand v. Hubbell, 115 Mass. 468. St. 1870, c. 179: Atty.-Gen. v. Boston & Maine R. R., 109 Mass. 100; Rand v. Hubbell, 115 Mass. 461; Mason v. Davol Mills, 132 Mass. 76.

Gen. St., c. 68, § 35: In re New South Meeting House in Boston, 13 Allen, 504; Columbian Book Co. v. De Golyer, 115 Mass. 68; In re Franklin Telegraph Co., 119 Mass. 447; Sohier v. Lamb, 134 Mass. 278.

Pub. St., c. 13, § 43; Pratt v. Street Com'rs of Boston, 139 Mass. 564, 2 N. E. Rep. 675.

Pub. St., c. 106, § 34: Pratt v. American Bell Telephone Co., 141 Mass. 228, 5 N. E. Rep. 307.

St. 1871, c. 110, § 2: Atty.-Gen. v. Mercantile Ins. Co., 121 Mass. 525.

St. 1870, c. 224, § 24: Dupee v. Boston Water Power Co., 114 Mass. 41.

St. 1865, c. 283, § 8: Atty.-Gen. v. Bay State Mining Co., 99 Mass. 148; Atty.-Gen. v. Mercantile Ins. Co., 121 Mass. 525; Firemen's Ins. Co. v. Commonwealth, 137 Mass. 83; Pratt v. Street Com'rs of Boston, 139 Mass. 562, 2 N. E. Rep. 675.

Gen. St., c. 60, § 21: Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

Gen. St., c. 61, § 6: Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 397.

Rev. St., c. 38, § 11: Whittenton Mills v. Upton, 10 Gray, 596.

Rev. St., c. 38, § 20: Holyoke Bank v. Burnham, 11 Cush. 186.

St. 1829, c. 53, § 10: Mill Dam Foundery v. Hovey, 21 Pick. 454; Child v. Boston & Fairhaven Iron Works, 137 Mass. 519.

Pub. St., c. 106, § 37: Smith v. Franklin Park Land, etc., Co., 168 Mass. 349, 47 N. E. Rep. 409.

St. 1877, c. 230, § 3: Mason v. Davol Mills, 132 Mass. 77.

St. 1875, c. 177, § 4: 1 Op. Atty.-Gen. 206.

Pub. St., c. 106, § 51: 1 Op. Atty.-Gen. 41, 205.

See also, generally, Treadwell v. Salisbury Mfg. Co., 7 Gray, 393 (sale); Pratt v. Jewett, 9 Gray, 34 (dissolution); Folger v. Columbian Ins. Co., 99 Mass. 267 (dissolution).

a. Increase of stock.[1541]

The present act permits a majority of the stockholders to decide how new stock shall be disposed of. This is a return to the common law.[1542]

"In the absence of any statute prescribing how it shall be disposed of, it may be allotted among the stockholders, or it may be sold from time to time as the corporation needs money. It may be sold by subscription, and the stockholders may be entitled to a preference in subscribing, and they may sell their rights . . . unless a statute or a by-law requires that the new stock shall all be subscribed for before it is created or issued, there is no implied condition that all the stock created shall be subscribed for or issued." [1543]

Where the directors of a company issued notes of the corporation exchangeable for stock after a certain date, it was held that it was not to be presumed that this referred to new issues of stock,[1544] as the directors had no power to make new issues, and at that time the statute provided for the distribution of new stock in a manner incompatible with such a contract.[1545] Similarly where the president of a corporation sold certain shares privately, when the statute required they should be sold at auction, it was held that the corporation could not be compelled to issue certificates for such shares.[1546]

[1541] As to stock dividends, see supra, § 32, *f*.

For forms of votes authorizing increases of stock, see Leland v. Hayden, 102 Mass. 542, 543; Com. v. Boston & Albany R. R. Co., 142 Mass. 146, 148, 7 N. E. Rep. 716.

[1542] Formerly, unless otherwise provided by law, stockholders were entitled to take new stock at par in proportion to their holdings at the date of increase, R. L., c. 109, § 29; and, if wrongfully deprived of the right so to subscribe, by the corporation or its officers, they could bring an action of tort against the corporation, in which the measure of damages was the excess of the market value above the par value, with interest. Gray v. Portland Bank, 3 Mass. 364.

[1543] Eaton v. Pacific National Bank, 144 Mass. 260, 275, per Field, J. Accord, on the point that there is no implied condition that the whole of the new issue shall be subscribed for, Nutter v. Lexington, etc., R. Co., 6 Gray, 85.

[1544] See Railway Co. v. Allerton, 18 Wall. 233.

[1545] Pratt v. American Bell Telephone Co., 141 Mass. 225, 5 N. E. Rep. 307.

[1546] Smith v. Franklin Park Land, etc., Co., 168 Mass. 345, 349, 47 N. E. Rep. 409.

Where, under previous acts, the stockholders had a power of specifying in what manner certain shares should be disposed of, it was held that this power could not be delegated to the directors.[1547] It seems, however, that if the directors pledge the corporation to the payment of debts or liability for new stock, the stockholders could ratify their acts by express action or by acquiescence.[1548]

It is desirable that votes and notices with regard to increase and disposition of stock should be very carefully worded, to indicate the terms on which stockholders shall be entitled to take the new stock, whether treasury stock is to participate, the method of payment for new stock and its participation on non-participation in dividends payable next after its issue. On general principles it would not participate in dividends declared before but payable after its issue.[1549]

b. — Rights.

A purchaser of rights must comply with the conditions as to payment prescribed in the offer of new stock, and cannot, where he has failed to pay in due season and the corporation has sold his shares as not taken, maintain a bill for specific performance, or a suit as against a trustee for the improper sale of trust property.[1550]

As between life tenants and remaindermen, rights are capital.[1551]

[1547] Smith v. Franklin Park, etc., Land Co., 168 Mass. 345, citing Mason v. Davol Mills, 132 Mass. 76; Crosby v. Dracut, 109 Mass. 206; Harris v. Marblehead, 10 Gray, 40; Re Leeds Banking Co., L. R. 1 Ch. 561; Monmouth Ins. Co. v. Lowell, 59 Me. 504; Silver Hook Road v. Greene, 12 R. I. 164; Farmers' Ins. Co. v. Chase, 56 N. H. 341; Rutland, etc., R. R. Co. v. Thrall, 35 Vt. 536. Cf. Pub. St., c. 106, § 37; R. L., c. 110, § 34.

[1548] Hayward v. Pilgrim Society, 21 Pick. 270. Cf. Arlington v. Peirce, 122 Mass. 270 (case of a municipal corporation).

[1549] Supra, § 32.

[1550] Sewall v. Eastern R. Co., 9 Cush. 5, that a holder of convertible bonds or notes is not entitled to rights to new stock, see Pratt v. American Bell Telephone Co., 141 Mass. 225; Parkinson v. West End St. Ry. Co., 173 Mass. 446.

[1551] Atkins v. Albree, 12 Allen, 359.

c. — Convertible bonds.

Ordinarily a corporation has no authority to issue bonds convertible into stock. If it has special authority, either prior or subsequent, the fact that the conversion results in an exceeding of the total capital stock otherwise authorized is immaterial.[1552]

Ordinarily, the time within which bonds can be converted is fixed by the statute or votes of the corporation. If no time is limited, the option must be exercised within a reasonable time.[1553]

When the option is duly exercised and the corporation has no stock on hand, it is liable in damages for the market value of the stock, though not to a decree for specific performance.[1554]

In case of consolidation, the right to convert bonds of an old corporation applies to the stock of the new corporation where the latter has assumed the rights and liabilities of the former.[1555] But convertible bonds or notes do not make the holders stockholders, so as to entitle them to rights to new stock.[1556]

d. — Issue of preferred stock.

The question how far a corporation which has common stock issued and outstanding can increase its capital by an issue of preferred stock is a troublesome one.[1557]

The present section provides that the capital stock may be increased by a majority of its stock outstanding and entitled to vote, and may change the classes of stock subsequently to be issued by a two-thirds vote of all its stock outstanding and entitled to vote. These provisions, although very definite and liberal, are not unlike the provisions in New Jersey and Maine

[1552] Belmont v. Erie R. Co., 52 Barb. 637, 669.

[1553] Catlin v. Green, 120 N. Y. 441; Holland v. Cheshire R. Co., 151 Mass. 231, 236.

[1554] Chaffee v. Middlesex R. Co., 146 Mass. 224.

[1555] Day v. Worcester, etc., R. Co., 151 Mass. 302; John Hancock Ins. Co. v. Worcester, etc., R. Co., 149 Mass. 214.

[1556] Pratt v. Amer. Bell Telephone Co., 141 Mass. 225; Parkinson v. West End St. Ry. Co., 173 Mass. 446.

[1557] American Tube Works v. Boston Machine Co., 139 Mass. 5, 9.

on the same subject;[1558] and in regard to the latter considerable doubt exists whether preferred stock can be created to the prejudice of common stock.[1559]

Two questions are involved in this matter: First, does the statute authorize such a proceeding; second, has anybody been hurt? It is obvious that, if a person takes stock in a corporation organized under an act which authorizes the corporation by a two-thirds vote to create preferred stock which shall have rights ahead of his stock, inasmuch as he is presumed to know the public law, he cannot complain. So, if the issue of preferred stock is authorized by vote of *all* the common stockholders, and such preferred stock is issued to *bona fide* holders, a common stockholder cannot be heard to object.[1560]

In view of a possible doubt on this subject, it is desirable that amendments increasing capital by the issue of preferred stock should be made by unanimous vote of all the common stock, and the same thing applies where it is desired to make increased common stock preferred stock.[1561]

e. Reduction of stock.

The act does not undertake to prescribe the way in which capital shall be reduced, although it does authorize the surrender of shares by every stockholder and the issue to him of a proportional decreased number of shares, if the assets of the corporation are not thereby reduced.[1562]

No reduction is lawful, however, which renders the corporation bankrupt or insolvent.[1563]

Capital may be reduced, apart from the statute, by pur-

[1558] N. J.: Laws of 1896, c. 185, § 27; Maine: Laws of 1901, c. 229, § 11; R. S. 1904, c. 47, § 49.

[1559] Dyer, Maine Corp. Law, 5th ed., 22; Ernst v. Elmira Municipal Improvement Co., 54 N. Y. Sup. 116; Wilcox v. Trenton Potteries Co., 64 N. J. Eq. 173. See also Campbell v. American Zylonite Co., 122 N. Y. 455; Ashbury v. Watson, 30 Ch. Div. 376.

[1560] Kent v. Quicksilver Min. Co., 78 N. Y. 159; Veeder v. Mudgett, 95 N. Y. 295. See Holland v. Cheshire R. Co., 151 Mass. 231.

[1561] 1 Cook, Corp., 5th ed., § 268.

[1562] Infra, § 43. Cf. Shoemaker v. Washburn Lumber Co., 97 Wis. 585; Currier v. Lebanon Slate Co., 56 N. H. 262.

[1563] Ibid.

chasing and canceling shares,[1564] or by canceling unissued shares.[1565]

But capital cannot be reduced so as to injure existing creditors.[1566]

Where capital is reduced so as to leave a surplus of assets, the net excess above debts may be distributed to stockholders in proportion to their holdings.[1567]

f. Sale of corporate assets.

Formerly a majority vote was all that was required to enable the directors to dispose of all the property of the corporation.[1568] "We entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient so to do. At common law the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances or quantity." [1569]

The corporation may take in payment the shares of a new corporation, to be distributed among such of the old stockholders as are willing to take them.[1570]

g. Change of business.

The provision authorizing a change of business, without a special authority from the legislature, dates from 1875.[1571]

[1564] Re Gatling Gun, 43 Ch. Div. 628; British, etc., Finance Co. v. Cowper, [1894] A. C. 399. As to the purchase of its own stock, see also supra, § 23, *a*, and infra, § 44.

[1565] Re Gatling Gun, 43 Ch. Div. 628.

[1566] Dane v. Young, 61 Me. 160.

[1567] Strong v. Brooklyn Crosstown R. Co., 93 N. Y. 426; Seeley v. New York, etc., Bank, 8 Daly, 400, 78 N. Y. 608.

[1568] Treadwell v. Salisbury Mfg. Co., 7 Gray, 393.

[1569] Treadwell v. Salisbury Mfg. Co., 7 Gray, 393, 404, per Bigelow, J. See also supra, § 4, *y*.

[1570] Treadwell v. Salisbury Mfg. Co., 7 Gray, 393, 405; Hodges v. New England Screw Co., 1 R. I. 347.

[1571] St. 1875, c. 177, § 4.

§ 41. Articles of amendment.

"Articles of amendment signed and sworn to by the president, treasurer and a majority of the directors shall, within thirty days after said meeting, be prepared, setting forth such amendment or alteration, and stating that it has been duly adopted by the stockholders. Such articles shall be submitted to the commissioner of corporations, who shall examine them in the same manner as the original articles of organization. If he finds that they conform to the requirements of law, he shall so certify and indorse his approval thereon, and they shall thereupon be filed in the office of the secretary of the commonwealth, who, upon payment of the fee hereinafter provided, shall cause them, and the indorsement thereon, to be recorded. No amendment or alteration of the agreement of association or articles of organization shall take effect until said articles of amendment shall have been filed in the office of the secretary of the commonwealth as aforesaid." [1572]

This provision in this form is substantially new.

It would seem that if articles of amendment contain superfluous statements, not required by the act, the commissioner need not approve the articles.[1573]

§ 42. Increase of capital stock.[1574]

"If an increase in the total amount of the capital stock of any corporation shall have been authorized by vote of its stockholders in accordance with the provisions of section forty, the articles of amendment shall also set forth: (a) the total amount of capital stock already authorized; (b) the amount of stock already issued for cash payable by instalments and the amount paid thereon; and the amount of full paid stock already issued for cash, property, services or expenses; (c) the amount of additional stock authorized; (d) the amount of such stock to be issued for cash, property, services or expenses, respectively; (e) a description of

[1572] St. 1903, c. 437, § 41. Cf. R. L., c. 109, §§ 9, 10; c. 110, §§ 31, 32, 47.

[1573] 1 Op. Atty.-Gen. 203. In this case a certificate of increase of capital, under Pub. St., c. 106, § 59, contained unnecessarily the words "one hundred and fifty thousand preferred stock and one hundred thousand common stock" and it was held that the commissioner was not obliged to pass upon the right of the corporation to characterize the increase in this manner.

[1574] For decisions on this subject, see supra, § 40.

said property and a statement of the nature of said services or expenses, in the manner required by the provisions of section eleven."[1575]

§ 43. Reduction of capital stock.[1576]

"If a reduction of the capital stock of any corporation shall have been authorized by its stockholders in accordance with the provisions of section forty, the articles of amendment shall also set forth (a) the total amount of capital stock already authorized and issued; (b) the amount of the reduction and the manner in which it shall be effected; (c) a copy of the vote authorizing the reduction. No reduction of capital stock shall be lawful which renders the corporation bankrupt or insolvent, but the capital stock may be reduced by the surrender by every stockholder of his shares and the issue to him in lieu thereof of a proportional decreased number of shares, if the assets of such corporation are not reduced thereby, without creating any liability of the stockholders of such corporation in case of the subsequent bankruptcy of such corporation."[1577]

§ 44. Remedy of minority stockholders.

"A stockholder in any corporation which shall have duly voted to sell, lease or exchange all its property and assets or to change the nature of its business in accordance with the provisions of section forty, who, at the meeting of stockholders, has voted against such action may, within thirty days after the date of said meeting, make a demand in writing upon the corporation for payment for his stock. If the corporation and the stockholder cannot agree upon the value of the stock at the date of such sale, lease, exchange or change, such value shall be ascertained by three disinterested persons, one of whom shall be named by the stockholder, another by the corporation and the third by the two thus chosen. The finding of the appraisers shall be final, and if their award is not paid by the corporation within thirty days

[1575] St. 1903, c. 437, § 42. Cf. R. L., c. 110, §§ 32–35; c. 110, § 54; Pub. St., c. 106, § 56; St. 1870, c. 224, § 34; Gen. St., c. 61, § 9; St. 1851, c. 133, § 8.

For filing fee, see infra, § 89.

[1576] For decisions on this subject, see supra, § 40, *c*.

[1577] St. 1903, c. 437, § 43. Cf. R. L., c. 110, §§ 32–34; c. 110, § 55; Pub. St., c. 106, § 57; St. 1870, c. 224, § 35; Gen. St., c. 61, § 9; St. 1855, c. 478, § 5.

after it is made, it may be recovered by the stockholder from the corporation in an action of contract. Upon payment by the corporation to the stockholder of the agreed or awarded price of his stock, the stockholder shall forthwith transfer and assign the stock certificates held by him at, and in accordance with, the request of the corporation." [1578]

This provision is new, and is similar to the law of Maine.[1579]

H. ANNUAL REPORTS.

§ 45. Form of annual report of condition.

"Every corporation shall annually, within thirty days after the date fixed in its by-laws for its annual meeting last preceding the date of such report, or within thirty days after the final adjournment of said meeting, but not more than three months after the date so fixed for said meeting, prepare a report of condition which shall be signed and sworn to by its president, treasurer and at least a majority of its directors stating: —

"1. The name of the corporation.

"2. The location (with street address) of its principal office in this commonwealth, and elsewhere in the case of a corporation organized to do business wholly outside the commonwealth.

"3. The date of its last preceding annual meeting.

"4. The total amount of its authorized capital stock; the amount issued and outstanding and the amount then paid thereon; the class or classes, if any, into which it is divided; the par value and number of its shares.

"5. The names and addresses of all the directors and officers of the corporation, and the date at which the term of office of each expires.

"6. A statement of the assets and liabilities of the corporation as of the date of the end of its last fiscal year, to be made substantially in the following form: —

ASSETS.

Real estate.....
Machinery .....
Merchandise:
Manufactures, merchandise, material and stock in process.

[1578] St. 1903, c. 437, § 44.
[1579] R. S. 1904, c. 47, § 59.

Cash and debts receivable.....
Patent rights .....
Trade marks .....
Good will .....
Profit and loss.....

Total.....

LIABILITIES.

Capital stock .....
Accounts payable .....
Funded indebtedness .....
Floating indebtedness .....
Surplus .....
Profit and loss.....

Total..... "1580

1580 St. 1903, c. 437, § 45; R. L., c. 110, § 51; St. 1896, c. 369; St. 1890, c. 199; St. 1887, c. 225; Pub. St., c. 106, § 54; St. 1874, c. 349, § 1; St. 1871, c. 110, §§ 4, 5; St. 1870, c. 224, § 33; St. 1866, c. 290, § 6; St. 1862, c. 210; Gen. St., c. 60, §§ 23, 24; c. 61, § 10; St. 1857, c. 276; St. 1855, c. 68, § 3; St. 1854, c. 438; St. 1851, c. 133, §§ 9, 10; St. 1838, c. 177; Rev. St., c. 38, § 22; St. 1829, c. 53, § 7.

Citations. — St. 1903, c. 437, § 45: Steel v. Webster, 188 Mass. 479.

R. L., c. 110, § 51: Steel v. Webster, 188 Mass. 479.

St. 1896, c. 369: Steel v. Webster, 188 Mass. 479.

St. 1890, c. 199: Steel v. Webster, 188 Mass. 479.

St. 1887, c. 225: Steel v. Webster, 188 Mass. 479.

Pub. St., c. 106, § 54: Felker v. Standard Yarn Co., 148 Mass. 226, 19 N. E. Rep. 220; s. c., 150 Mass. 265, 22 N. E. Rep. 869; Bryant v. Peck & Whipple Co., 154 Mass. 460, 28 N. E. Rep. 678; Steel v. Webster, 188 Mass. 479, 480; 1 Op. Atty.-Gen. 187, 189, 279.

St. 1870, c. 224, § 33: Nickerson v. Wheeler, 118 Mass. 299; Child v. Boston & Fairhaven Iron Works, 137 Mass. 517.

St. 1862, c. 210: Byers v. Franklin Coal Co., 106 Mass. 131; Thayer v. N. E. Lithographic Co., 108 Mass. 523; Pope v. Leonard, 115 Mass. 286; Priest v. Essex Hat Mfg. Co., 115 Mass. 381; McRae v. Locke, 118 Mass. 269; Nickerson v. Wheeler, 118 Mass. 295; Atty.-Gen. v. Mercantile Ins. Co., 121 Mass. 525; Steel v. Webster, 188 Mass. 480.

Gen. St., c. 60, § 23: Peele v. Phillips, 8 Allen, 89.

Gen. St., c. 60, § 24: Cochrane v. Reed, 13 Allen, 455.

Gen. St., c. 61, § 10: Com. v. Hamilton Mfg. Co., 12 Allen, 309; Cochrane v. Reed, 13 Allen, 455; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 395; Pope v. Leonard, 115 Mass. 286.

St. 1857, c. 276: Cochrane v. Reed, 13 Allen, 457.

a. Purpose of this section.

The purpose of this section is to enable persons who may have occasion to deal with the corporation to ascertain its condition and its title to credit.[1581]

One who has sold goods on credit to a corporation, being deceived by a false return made with the purpose of giving the corporation a standing to which it was not entitled, may rescind the sale and maintain replevin for the goods.[1582]

b. Contents of report.

It will be noticed that this report, which is open to the inspection of the public, is no longer required to contain the names of stockholders or the amount of their holdings; thus making the list of stockholders strictly private, as the tax return is not open to the public.[1583] On the other hand, this report is required to contain the names and addresses of officers and directors.

The detailed form of schedule of assets and liabilities is also prescribed by the act, instead of being referred by the statute to the commissioner of corporations, as formerly.

The tax commissioner cannot consider debts of the corporation, in determining the value of the corporate franchise, unless the return contains a sworn statement setting forth that

St. 1854, c. 438: Atty.-Gen. v. Mercantile Ins. Co., 121 Mass. 525.

St. 1851, c. 133, § 9: Bond v. Clark, 6 Allen, 361; Bond v. Morse, 9 Allen, 471.

St. 1851, c. 133, § 10: Peele v. Phillips, 8 Allen, 86.

Rev. St., c. 38, § 22: Sargent v. Webster, 13 Met. 506; Wyman v. American Powder Co., 8 Cush. 182; Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. 580; Holyoke Bank v. Burnham, 11 Cush. 186; Whittenton Mills v. Upton, 10 Gray, 596; Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 14 Gray, 194; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray, 216; Howe v. Boston Carpet Co., 16 Gray, 493; Cary v. Holmes, 2 Allen, 498; Taylor v. N. E. Coal Mining Co., 4 Allen, 578.

St. 1829, c. 53, § 7: Mill Dam Foundery v. Hovey, 21 Pick. 454; Howe v. Boston Carpet Co., 16 Gray, 497.

[1581] Felker v. Standard Yarn Co., 148 Mass. 226.

[1582] Steel v. Webster, 188 Mass. 478.

[1583] St. 1903, c. 437, § 48. Cf., as to public service corporations, 1 Op. Atty.-Gen. 279 (railroads); 1 Op. Atty-Gen. 186 (gas companies).

no part of such debts was incurred for the purpose of reducing taxes.[1584]

§ 46. Filing of annual report.

"Such report shall be submitted to the commissioner of corporations, who shall examine it and if he finds that it conforms to the requirements of this act, he shall indorse his approval thereon; and upon the payment of the fee hereinafter provided, it may be filed in the office of the secretary of the commonwealth, who shall receive and preserve it in book form convenient for reference and open to public inspection." [1585]

If a report contain superfluous recitals, it seems that the commissioner is not obliged to approve it.[1586]

The fee for filing this report is five dollars.[1587]

§ 47. Verification by auditor.

"Such report of a corporation which has a capital stock of one hundred thousand dollars or more shall be accompanied by a written statement under oath by an auditor to be employed for each ensuing fiscal year by a committee of three stockholders who are not directors which shall be selected at each annual meeting of the stockholders, or, if there are not three stockholders other than directors able and willing to serve on such committee, then to be employed by the directors, stating that such report represents the true condition of the affairs of said corporation as disclosed by its books at the time of making such audit. The statement of the auditor shall be filed by him with said report in the office of the secretary of the commonwealth and shall be attached to and form part of it. The auditor shall be sworn to the faithful performance of his duties by a justice of the peace or some other magistrate authorized to administer oaths or affirmations; and

[1584] St. 1907, c. 395, § 1.

[1585] St. 1903, c. 437, § 46; R. L., c. 110, § 57; St. 1898, c. 503, § 1; St. 1896, c. 369; St. 1887, c. 225; Pub. St., c. 106, § 59; St. 1870, c. 224, § 37.

Citations. — St. 1896, c. 369: Steel v. Webster, 188 Mass. 479.

St. 1887, c. 225: Steel v. Webster, 188 Mass. 479.

Pub. St., c. 106, § 59: Chase's Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 431, 28 N. E. Rep. 300.

St. 1870, c. 224, § 37: Nickerson v. Wheeler, 118 Mass. 299.

[1586] 1 Op. Atty-Gen. 203.

[1587] See infra, § 90.

evidence of such appointment and qualification shall be filed in the office of the commissioner of corporations." [1588]

§ 48. Annual tax return.

"Every corporation shall annually, between the first and tenth days of May, make a return to the tax commissioner, under the oath of its treasurer, stating the name of the corporation and setting forth as of the first day of May of the year in which the return is made: —

"1. The total authorized amount of the capital stock of the corporation; the amount issued and outstanding and the amount then paid thereon; the classes, if any, into which it is divided; the par value and number of its shares; the market value of the shares of its stock, or of each class of its stock if there are two or more classes.

"2. A statement in such detail as the tax commissioner may require of the real estate, machinery, merchandise and other assets belonging to the corporation within and without the commonwealth.

"3. A complete list of the stockholders of the corporation, their residences and the amount and class of stock, if more than one, belonging to each. If stock is held as collateral security, the list shall state the name and residence of the pledgor and of the pledgee.

"Such return shall be filed by the tax commissioner, and shall be open only to the inspection of the tax commissioner, his clerks and assistants, and such other officers of the commonwealth as may have occasion to inspect it for the purpose of assessing or of collecting taxes." [1589]

[1588] St. 1903, c. 437, § 47; R. L., c. 110, § 52; St. 1898, c. 64; St. 1897, c. 492. These have not been cited to 193 Mass. incl.

[1589] St. 1903, c. 437, § 48; R. L., c. 14, § 37; St. 1898, c. 417; c. 578, § 2; St. 1888, c. 413, § 24; St. 1886, c. 270; St. 1885, c. 238, § 1; Pub. St., c. 13, § 38; St. 1880, c. 117, § 2; St. 1865, c. 283, § 3; St. 1864, c. 208, §§ 2, 3.

Citations. — R. L., c. 14, § 37: Hamilton Mfg. Co. v. Lowell, 185 Mass. 114, 117.

St. 1898, c. 578, § 2: Boston v. Union Freight R. R., 181 Mass. 208, 63 N. E. Rep. 412.

St. 1888, c. 413, § 24: Nash v. Brown, 165 Mass. 384, 43 N. E. Rep. 160.

Pub. St., c. 13, § 38: Boston Mfg. Co. v. Commonwealth, 144 Mass. 598, 12 N. E. Rep. 362; Lowell v. County Com'rs, 146 Mass. 408, 25 N. E. Rep.

The provision in the last clause, that tax returns shall not be open to the public, is declaratory of the law as it was under the Public Statutes.[1590]

There is no fee for filing the annual tax return.[1591]

§ 49. Penalty for failure to file reports and returns.

"If a corporation fails to file its report of condition within thirty days after the date of its annual meeting or of a final adjournment thereof, or its tax return before the tenth day of May of each year, the commissioner of corporations or the tax commissioner, as the case may be, shall give notice by mail, postage prepaid, to such corporation of its default. If it omits to file such report or return within thirty days after such notice of default has been given, it shall forfeit to the commonwealth not less than five nor more than ten dollars for each day for fifteen days after the expiration of the said thirty days, and not less than ten nor more than two hundred dollars for each day thereafter during which such default continues or any other sum, not greater than the maximum penalty or forfeiture, which the court may deem just and reasonable. If a corporation fails for two successive years to file its annual report of condition, the supreme judicial court, upon application by the commissioner of corporations, after notice and a hearing, may decree a dissolution of the corporation." [1592]

It has been held that penalties for failure to file tax returns

469; Boston & Albany R. R. Co. v. Commonwealth, 157 Mass. 70, 31 N. E. Rep. 696; Atty.-Gen. v. Mass., etc., Gas Co., 179 Mass. 20, 60 N. E. Rep. 389; Worcester v. Board of Appeal, 184 Mass. 465.

St. 1865, c. 283, § 3: Atty.-Gen. v. Mercantile Ins. Co., 121 Mass. 525; Pratt v. Street Com'rs of Boston, 139 Mass. 561, 2 N. E. Rep. 675; Minot v. Winthrop, 162 Mass. 121, 38 N. E. Rep. 512.

See also, generally, Commonwealth v. Lowell Gas Light Co., 12 Allen, 75; Walworth v. Brackett, 98 Mass. 98; 1 Op. Atty.-Gen. 278.

[1590] 1 Op. Atty.-Gen. 278.

[1591] See infra, § 90.

[1592] St. 1906, c. 346, § 1; St. 1903, c. 437, § 49; R. L., c. 14, § 58; R. L., c. 110, §§ 53, 84; St. 1900, c. 398; St. 1898, c. 417; Pub. St., c. 13, §§ 22, 28, 36, 54; St. 1880, c. 227, § 4; St. 1878, c. 218, § 3; St. 1873, c. 141, § 10; St. 1865, c. 283, § 14; St. 1862, c. 224, § 11; Pub. St., c. 106, § 55; St. 1887, c. 225; St. 1896, c. 369; St. 1877, c. 230, § 2; St. 1896, c. 369; St. 1887, c. 225; Pub. St., c. 106, §§ 81, 82; St. 1877, c. 57; St. 1870, c. 224, § 60; St. 1866, c. 290, § 9; St. 1863, c. 246.

Citations. — St. 1887, c. 225: Steel v. Webster, 188 Mass. 479.

cannot be enforced against corporations in the hands of receivers, and perpetually enjoined from transacting business.[1593]

§ 50. Enforcement of penalties.

"Penalties or forfeitures incurred by any corporation which, being subject to the provisions of this act, omits to cause any certificate or return which may be required by the provisions of sections forty-five, forty-eight, sixty and sixty-six, to be duly filed may be recovered in an action brought in the county of Suffolk in the name of the commonwealth, or they may be recovered by an information in equity in the name of the attorney-general at the relation of the tax commissioner or commissioner of corporations, as the case may be, brought in the supreme judicial court in the county of Suffolk. Upon such information, the court may issue an injunction restraining the further prosecution of the business of the corporation named therein until such penalties or forfeitures, with interest and costs, have been paid and until the returns and certificates required by this act have been filed." [1594]

St. 1865, c. 283, § 14: Atty.-Gen. v. Bay State Mining Co., 99 Mass. 148.

St. 1862, c. 224, § 11: Com. v. Lancaster Savings Bank, 123 Mass. 496; Edwards v. Warren Linoline, etc., Works, 168 Mass. 567, 47 N. E. Rep. 502.

St. 1896, c. 369: Steel v. Webster, 188 Mass. 479.

St. 1863, c. 246: Pope v. Salamanca Oil Co., 115 Mass. 290.

See also, generally, W. U. Tel. Co. v. Massachusetts, 125 U. S. 530.

Historical. Formerly, a corporation failing to file a report or return was liable to a fine of two hundred dollars, and the treasurer and directors were jointly liable to a like fine, but there were no fines for delay.

[1593] Commonwealth v. Lancaster Savings Bank, 123 Mass. 493, 497. Cf. Columbian Book Co. v. De Golyer, 115 Mass. 67, 69.

[1594] St. 1903, c. 437, § 50; R. L., c. 14, §§ 55, 58, 59; R. L., c. 110, § 84; St. 1898, c. 417; St. 1892, c. 129; St. 1890, c. 197, § 2; Pub. St., c. 13, §§ 7, 28, 36, 54; St. 1880, c. 227, § 4; St. 1878, c. 218, § 3; St. 1873, c. 141, § 9; St. 1865, c. 283, § 14; St. 1864, c. 208, § 14; St. 1862, c. 224, § 9; St. 1900, c. 398; St. 1898, c. 417; Pub. St., c. 13, §§ 22, 28, 36, 54; St. 1880, c. 227, § 4; St. 1878, c. 218, § 3; St. 1873, c. 141, § 10; St. 1865, c. 283, § 14; St. 1862, c. 224, § 11; St. 1885, c. 238; St. 1886, c. 270; Pub. St., c. 13, § 55; St. 1866, c. 291, § 1; St. 1896, c. 369; St. 1887, c. 225; Pub. St., c. 106, §§ 81, 82; St. 1877, c. 57; St. 1870, c. 224, § 60; St. 1866, c. 290, § 9; St. 1863, c. 246.

Citations. — St. 1903, c. 437, § 50: Attorney-General v. Electric Storage Battery Co., 188 Mass. 239.

This section also applies to the failure of a corporation to file a certificate of the changes in its officers or to keep a clerk within the Commonwealth.[1595]

I. DISSOLUTION OF CORPORATIONS.

§ 51. Dissolution, in general.

"A corporation which desires to close its affairs may, unless otherwise provided in the agreement of association, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, authorize a petition for its dissolution to be filed in the supreme judicial court or in the superior court setting forth in substance the grounds of the application; and the court, after notice to parties interested and a hearing, may decree a dissolution of the corporation. A corporation so dissolved shall be held to be extinct in all respects as if its corporate existence had expired by the limitation of its charter." [1596]

St. 1865, c. 283, § 14: Atty.-Gen. v. Bay State Mining Co., 99 Mass. 148.

St. 1864, c. 208, § 14: Oliver v. Colonial Gold Co., 11 Allen, 284.

St. 1862, c. 224, § 11: Com. v. Lancaster Savings Bank, 123 Mass. 496; Edwards v. Warren Linoline, etc., Works, 168 Mass. 567, 47 N. E. Rep. 502.

St. 1863, c. 246: Pope v. Salamanca Oil Co., 115 Mass. 290.

St. 1887, c. 225: Steel v. Webster, 188 Mass. 479.

St. 1896, c. 369: Steel v. Webster, 188 Mass. 479.

See also, generally, Liverpool Ins. Co. v. Mass., 10 Wall. 566 (bill for injunction until tax paid); W. U. Tel. Co. v. Mass., 125 U. S. 530 (same).

[1595] St. 1907, c. 282, § 2. Cf. supra, § 18, *q*.

[1596] St. 1903, c. 437, § 51; R. L., c. 109, § 52; Pub. St., c. 105, § 40; Gen. St., c. 68, § 35; St. 1852, c. 55, §§ 1, 3.

Citations. — Gen. St., c. 68, § 35: In re New South Meeting House in Boston, 13 Allen, 504; Columbian Book Co. v. De Golyer, 115 Mass. 68; In re Franklin Telegraph Co., 119 Mass. 447; Sohier v. Lamb, 134 Mass. 278.

See also, generally, Heard v. Talbot, 7 Gray, 119; Treadwell v. Salisbury Mfg. Co., 7 Gray, 393; Pratt v. Jewett, 9 Gray, 34; Folger v. Columbian Insurance Co., 99 Mass. 267.

Historical. As to earlier methods of dissolution and the use of quo warranto, see Goddard v. Smithett, 3 Gray, 116; Commonwealth v. Union Ins. Co., 5 Mass. 230; Hastings v. Amherst, etc., R. Co., 9 Cush. 596.

Section 40 provides that "every corporation may at a meeting duly called for the purpose, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, . . . authorize proceedings for its dissolution under the provisions of section fifty-one."

It seems that since the statute prescribes the method for the dissolution of a corporation, that method should be followed.[1597] Whether the articles of organization could provide for a different method, query.[1598]

a. Modes of dissolution.[1599]

"The only modes of dissolving a corporation known to the common law, were, by the death of all its members; by act of the legislature; by a surrender of the charter, accepted by the government; or by forfeiture of the franchise, which could only take effect upon a judgment of a competent tribunal on a proceeding in behalf of the State; and neither a court of law nor a court of equity had jurisdiction to decree a forfeiture of the charter or dissolution of the corporation at the suit of an individual."[1600] "In the absence of express conditions in an act of incorporation, by which corporate rights and powers are made to depend on their due exercise, a nonuser or misuser of them does not operate as a surrender or forfeiture of the charter."[1601] "The dissolution of a corporation is a peculiar function which resides primarily in the legislature and is conferred upon courts only by explicit legislative authority."[1602]

At common law, the right of corporations, acting by a ma-

[1597] See Hunt v. American Grocery Co., 81 Fed. Rep. 532, holding that an attempt to dissolve in a manner different from that prescribed by the New Jersey corporation act would be enjoined.

[1598] Cf. supra, § 8, (*f*).

[1599] See also infra, under *c*.

[1600] Folger v. Columbian Ins. Co., 99 Mass. 267, 274, per Gray, J.; Boston Glass Mfg. Co. v. Langdon, 24 Pick. 52, 53; Heard v. Talbot, 7 Gray, 113, 119, 120. Cf. Penobscot Boom Co. v. Lamson, 16 Me. 224; Hodsdon v. Copeland, 16 Me. 314.

[1601] Heard v. Talbot, 7 Gray, 113, 119, per Bigelow, J.

[1602] Olds v. City Trust Co., 185 Mass. 500, 505; Folger v. Columbian Ins. Co., 99 Mass. 267.

jority of their stockholders, to sell their property was absolute, and was not limited as to objects, circumstances or quantity; and the statute provided a permissive mode of dissolution without recourse to the legislature.[1603]

Although "a corporation may be dissolved by the death of all its members, or by the loss of an integral part of its organization, so that the exercise of its corporate functions cannot be restored,"[1604] yet when the corporation has entered upon its corporate existence, the death of the original members will not dissolve it.[1605]

b. Grounds for dissolution.

In one case, it was held that the court would not decree the dissolution of a religious corporation against the protest of a minority, merely upon proof that it was not prosperous and could not continue in its then location.[1606] So, in the case of a telegraph company, it was held to be no good ground for dissolution that it leased its line at a too low rental to another corporation in which the majority stockholders were interested, if such lease was cancelled after the filing of the petition.[1607]

So, also, the facts that one person owns the majority of the stock, and has for many years controlled the election of officers, and managed the business of the corporation to suit himself, and at a loss, and that he has refused to make any change in the business or to buy the shares of the petitioners, is no ground for a dissolution of the corporation, even though the minority of the stock is owned by a majority of the stockholders.[1608]

c. Dissolution of corporations having special charters.

In a case before statute provisions were made for dissolution, a corporation having a special perpetual charter made a

[1603] Treadwell v. Salisbury Mfg. Co., 7 Gray, 393, 404, 406. Cf. Folger v. Chase, 18 Pick. 63. See also supra, § 40.

Public service corporations are governed by different principles. See Evans v. Boston Heating Co., 157 Mass. 37, 39.

[1604] McGinty v. Athol Reservoir Co., 155 Mass. 183, 185, per Morton, J.; Penobscot Boom Co. v. Lamson, 16 Me. 224, 231.

[1605] McGinty v. Athol Reservoir Co., 155 Mass. 183, 187.

[1606] Re New South Meeting House in Boston, 13 Allen, 504.

[1607] Re Franklin Telegraph Co., 119 Mass. 447.

[1608] Pratt v. Jewett, 9 Gray, 34.

contract for the life of a certain individual, and it was held that a mere notice to the executive department of the government that it claimed no further rights under its charter, and a vote of the majority of the stockholders to dissolve could not effect a dissolution, or terminate the contract in question.[1609]

The surrender of a special charter could be made only by some formal act of the corporation, and then was of no avail until accepted by the government.[1610] Neither an assignment for creditors,[1611] nor insolvency,[1612] nor a failure to choose officers,[1613] or hold meetings,[1614] nor the failure to do any corporate act for two years,[1615] nor the purchase by certain individuals of all the shares,[1616] nor a sale of its assets,[1617] worked a dissolution of the corporation. Charters sometimes provide that they shall lapse if something is not done within a certain time, but the dissolution of the corporation cannot be determined in a suit between individuals.[1618] "It is too well settled to admit of discussion that a corporation can be judicially determined to have ceased to exist only in a suit to which the commonwealth is a party. The act of incorporation is a contract between the commonwealth and the corporation; whether the corporation has complied with the conditions is a question of fact to be judicially determined. The commonwealth may waive a strict compliance with the terms of the act,

[1609] Revere v. Boston Copper Co., 15 Pick. 351.

[1610] Boston Glass Mfy. v. Langdon, 24 Pick. 49, 53; Stone v. Framingham, 109 Mass. 303, 305.

[1611] Ibid.

[1612] Boston Glass Mfy. v. Langdon, 24 Pick. 49.

[1613] Ibid.; Russell v. McClellan, 14 Pick. 63; Knowlton v. Ackley, 8 Cush. 93; Revere v. Boston Copper Co., 15 Pick. 351; Oakes v. Hill, 14 Pick. 442; Packard v. Old Colony R. Co., 168 Mass. 92, 99; Hoboken Building Association v. Martin, 13 N. J. Eq. 427.

[1614] Packard v. Old Colony R. Co., 168 Mass. 92, 99.

[1615] Russell v. McClellan, 14 Pick. 63; Rollins v. Clay, 33 Me. 132; Baptist, etc., Proprietors v. Webb, 66 Me. 398.

[1616] Russell v. McClellan, 14 Pick. 63; Newton Manuf. Co. v. White, 42 Ga. 148. But see Cook v. Kent, 105 Mass. 246, 254. Cf. England v. Dearborn, 141 Mass. 590, 6 N. E. Rep. 837; Oakes v. Hill, 14 Pick. 442.

[1617] Rollins v. Clay, 33 Me. 132.

[1618] Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71; Knowlton v. Ackley, 8 Cush. 93, 95; Falmouth Bank v. Cape Cod Ship Canal Co., 166 Mass. 550, 568, 44 N. E. Rep. 617.

and may elect whether it will insist upon a forfeiture if there has been a breach of condition." [1619]

d. Dissolution of a foreign corporation by the chartering State.

Although, in general, full faith is to be given to the judicial proceedings of another State, and there is a presumption that a particular proceeding is valid, yet such a presumption is not conclusive. Therefore, where a foreign corporation is dissolved by a decree of the chartering State, our courts will consider whether the foreign court had jurisdiction, and, if it had none, the dissolution will not be regarded in Massachusetts.[1620]

The Massachusetts statutes continuing a corporation in existence for three years after its dissolution, for the purpose of winding up its affairs, have no application to foreign corporations.[1621]

§ 52. Continuation for three years to close affairs.

"Every corporation whose charter expires by its own limitation or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for three years after the time when it would have been so dissolved, for the purpose of prosecuting and defending suits by or against it and of enabling it gradually to settle and close its affairs, to dispose of and convey its property and to divide its capital stock, but not for the purpose of continuing the business for which it was established." [1622]

[1619] Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71, 72, per Colburn, J., citing Commonwealth v. Union Ins. Co., 5 Mass. 230; Boston Glass Mfy. v. Langdon, 24 Pick. 49; Heard v. Talbot, 7 Gray, 113; Folger v. Columbian Ins. Co., 99 Mass. 267, 274; Rice v. Nat. Bank of Commonwealth, 126 Mass. 300.

[1620] Folger v. Columbian Insurance Co., 99 Mass. 267; Olds v. City Trust Co., 185 Mas. 500. Cf. Kelley v. Kelley, 161 Mass. 111, 112.

[1621] Olds v. City Trust Co., 185 Mass. 500. Cf. R. L., c. 109, § 53, and infra, § 52.

[1622] St. 1903, c. 437, § 52; R. L., c. 109, § 53; Pub. St., c. 105, § 41; Gen. St., c. 68, § 36; Rev. St., c. 44, § 7; St. 1819, c. 43.

a. Effect of continuation.

This provision is constitutional, and tends to enforce contracts rather than to impair them,[1623] and the qualified prolongation of a corporation's existence is in the nature of an administration of its estate.[1624]

Dissolution "does not impair the obligation of contracts made by the corporation with other parties during its existence, or prevent its creditors or stockholders from asserting their rights against its property in a court of chancery, in accordance with the reasonable regulations of the legislature, or with the general principles and practice in equity." [1625]

It will be noticed that the continuation lasts only for three

Citations. — R. L., c. 109, § 53: Olds v. City Trust Co., 185 Mass. 500, 505.

Pub. St., c. 105, § 41: Stone v. Reed, 152 Mass. 180, 25 N. E. Rep. 49; Hale v. Cheshire R. R., 161 Mass. 445, 37 N. E. Rep. 307.

Gen. St., c. 68, § 36: In re New South Meeting House in Boston, 13 Allen, 504; Chamberlin v. Huguenot Mfg. Co., 118 Mass. 537; New Bedford R. R. v. Old Colony R. R., 120 Mass. 400; Thornton v. Marginal Freight Railway, 123 Mass. 32; Bigelow v. Union Freight Railroad, 137 Mass. 479.

Rev. St., c. 44, § 7: Com. v. Com. Bank, 22 Pick. 176; Crease v. Babcock, 23 Pick. 345; Atlas Bank v. Nahant Bank, 23 Pick. 480; Crease v. Babcock, 10 Met. 561.

St. 1819, c. 43: Foster v. Essex Bank, 16 Mass. 246, 270; Revere v. Boston Copper Co., 15 Pick. 353; Folger v. Chase, 18 Pick. 63. See also, generally, Heard v. Talbot, 7 Gray, 119; Treadwell v. Salisbury Mfg. Co., 7 Gray, 393; Pratt v. Jewett, 9 Gray, 34; Folger v. Columbian Ins. Co., 99 Mass. 267; In re Franklin Telegraph Co., 119 Mass. 447.

Historical. Under Rev. St., c. 44, § 31, those who were stockholders when the charter of a corporation expired were held liable for its debts, and it was held that they could not postpone their liability to the end of the three years, but that the charter expired at once upon its repeal. Crease v. Babcock, 23 Pick. 334, 336. Cf., s. c., 10 Met. 525, 561.

The present section is identical with the corresponding section of the Revised Laws.

[1623] Foster v. Essex Bank, 16 Mass. 246, 270. See also Simmons v. Hanover, 23 Pick. 188, 193.

[1624] Crease v. Babcock, 23 Pick. 334, 346; Richards v. Attleborough Nat. Bank, 148 Mass. 187, 191.

[1625] Thornton v. Marginal Freight Railway, 123 Mass. 32, 34, per Gray, C. J., citing Foster v. Essex Bank, 16 Mass. 245; Read v. Frankfort Bank, 23 Me. 318; Merrill v. Suffolk Bank, 31 Me. 57; Mumma v. Potomac Co., 8 Pet. 281; Curran v. Arkansas, 15 How. 304; Bacon v. Robertson, 18 How. 480; Lum v. Robertson, 6 Wall. 277.

years. Therefore a judgment recovered against a corporation after three years from its dissolution, in a case where no receiver has been appointed, is void.[1626] During the three years, the corporation can and must exercise all the functions necessarily incident to its limited and restricted action, including the holding of meetings, passing of votes, electing directors and other agents; and the title to its property remains in the corporation, and does not vest in the directors as trustees or otherwise.[1627]

The provision that the corporation still continues for the purpose of prosecuting and defending suits is declaratory of the previous law.[1628]

In the case of an ordinary liquidation or winding up, common and preferred stockholders stand on the same footing.[1629] Although there can be no transfers of stock after dissolution, yet where the title to stock has been transferred on the books of the company, prior to the dissolution, the treasurer may sign the new certificate;[1630] and similarly the clerk may, it seems, sign the records of a meeting held before the dissolution, such acts being purely ministerial.[1631]

b. Special provisions.

Where there is some special legislative provision respecting a particular corporation, the general process of winding up provided in this act may not apply.[1632] Where dissolution was formerly effected by a special act of the legislature, existing rights were usually protected by express provisions, and

[1626] Thornton v. Marginal Freight Railway, 123 Mass. 32; Richards v. Attleborough Nat. Bank, 148 Mass. 188, 191. Cf. Bigelow v. Union Freight Railroad, 137 Mass. 478.

[1627] Com. v. Commonwealth Bank, 22 Pick. 176, 180; Folger v. Chase, 18 Pick. 63. In many other jurisdictions the statutes provide otherwise.

[1628] Richards v. Attleborough Nat. Bank, 148 Mass. 188, 191; National Bank v. Insurance Co., 104 U. S. 54.

[1629] Hale v. Cheshire Railroad, 161 Mass. 443, 445.

[1630] Sewall v. Chamberlain, 16 Gray, 581.

[1631] Sewall v. Chamberlain, 16 Gray, 581.

[1632] E. g., Cheshire R. R. Co. See Hale v. Cheshire R. Co., 161 Mass. 445, 37 N. E. Rep. 307.

clauses similar to that in this section were usually contained or referred to in the repealing act.[1633]

c. Foreign corporations.

This section does not apply to corporations organized in other States;[1634] and query, whether, after a foreign corporation is dissolved by the chartering State, a Massachusetts creditor cannot treat the corporation as still existing in order to reach assets here.[1635]

Our courts will, at any rate, take jurisdiction where the statutes of the chartering State provide for its continuation in the hands of a receiver or trustee for the purpose of winding up.[1636]

§ 53. Receivers.

"If the charter of a corporation expires or is annulled, or if the corporation is dissolved, or if a judgment has been recovered against it, and it has neglected, for thirty days after demand made on execution, to pay the amount due, with the officer's fees, or to exhibit to the officer real or personal property belonging to it and subject to be taken on execution, sufficient to satisfy the same, and the execution has been returned unsatisfied, the supreme judicial court or the superior court shall have jurisdiction in equity upon application of a creditor or stockholder to appoint one or more receivers to take charge of its estate and effects and to collect the debts and property due and belonging to it; with power to prosecute and defend suits in its name or otherwise, to appoint agents under them and to do all other acts which might be done by such corporation, if in being, which may be necessary for the final settlement of its unfinished business. The powers of such receivers and the existence of the corporation may be continued as long as the court finds necessary for said purposes." [1637]

[1633] See Chamberlin v. Huguenot Mfg. Co., 118 Mass. 532, 537; Com. v. Com. Bank, 22 Pick. 176. Cf., as to an amalgamation, New Bedford R. R. v. Old Colony R. R., 120 Mass. 397, 400.

[1634] Olds v. City Trust Co., 185 Mass. 500, 505.

[1635] Ibid.

[1636] Michigan State Bank v. Gardner, 15 Gray, 362, 373.

[1637] St. 1905, c. 156; St. 1903, c. 437, § 53; R. L., c. 109, § 54; St. 1884, c. 203; Pub. St., c. 105, §§ 42, 43; Gen. St., c. 68, §§ 37, 38; St. 1852, c. 55, § 2; Rev. St., c. 44, §§ 8, 9; St. 1833, c. 145.

This section is substantially the same as in the Revised Laws, with the addition of the clause about neglecting to satisfy an execution. The provision in the last sentence about the continuation of the existence of the corporation by the court was added by St. 1905, c. 156.

a. When a receiver may be appointed.

This section and the following one relate to the appointment of receivers in contemplation of winding up the corporation and dissolving it.

Where no proper steps have been taken to dissolve the corporation, a receiver cannot be appointed, except as otherwise provided in this section.[1638] On the other hand, if a suit is brought by a creditor, asking for the appointment of a receiver, it is substantially brought on behalf of all creditors, and the plaintiff cannot discontinue it.[1639]

A receiver may also be appointed to administer the affairs of a corporation for a longer or shorter period, even though the primary purpose is not to dissolve the corporation.[1640]

Citations. — Pub. St., c. 105, § 42: Wilson v. Welch, 157 Mass. 81, 31 N. E. Rep. 712; Hale v. Cheshire R. R., 161 Mass. 445, 37 N. E. Rep. 307; Falmouth Bank v. Cape Cod Ship Canal Co., 166 Mass. 568, 44 N. E. Rep. 617.

Pub. St., c. 105, § 43; Gen. St., c. 68, § 37: In re New South Meeting House in Boston, 13 Allen, 504; Columbian Book Co. v. De Golyer, 115 Mass. 68; Chamberlin v. Huguenot Mfg. Co., 118 Mass. 537; In re Eastern R. R., 120 Mass. 413; Thornton v. Marginal Freight Railway, 123 Mass. 32; Bigelow v. Union Freight Railroad, 137 Mass. 479.

Gen. St., c. 68, § 38: In re New South Meeting House in Boston, 13 Allen, 504; Com. v. Gould, 118 Mass. 304; Bigelow v. Union Freight Railroad, 137 Mass. 479.

St. 1852, c. 55, § 2; Rev. St., c. 44, § 8: Atlas Bank v. Nahant Bank, 23 Pick. 487; Hubbard v. Hamilton Bank, 7 Met. 342; Farmers & Mechanics' Bank v. Jenks, 7 Met. 595; Baker v. Atlas Bank, 9 Met. 188; Com. v. Cochituate Bank, 3 Allen, 47; In re Eastern R. R., 120 Mass. 413.

Rev. St., c. 44, § 9: Atlas Bank v. Nahant Bank, 23 Pick. 487; Hubbard v. Hamilton Bank, 7 Met. 341; Baker v. Atlas Bank, 9 Met. 182.

St. 1833, c. 145: In re Eastern R. R. Co., 120 Mass. 413.

See also, generally, Ellis v. Boston, Hartford & Erie R. R., 107 Mass. 1.

[1638] Falmouth Bank v. Cape Cod Ship Canal Co., 166 Mass. 550, 568, 44 N. E. Rep. 617.

[1639] Atlas Bank v. Nahant Bank, 23 Pick. 480.

[1640] Jones v. Arena Publishing Co., 171 Mass. 22.

"Generally, the appointment of a receiver rests in the sound discretion of the court. But in order to justify the appointment of one on the application of a creditor, it should at least appear that he has a valid claim against the corporation, that there are assets applicable to its payment, and that he has exhausted his legal remedies, or that the circumstances are such that to deny the application would lead to a wasting and loss of property which otherwise might be made available for the payment of the debts of the corporation, and which could not be availed of in any other manner so satisfactorily as by the appointment of a receiver. . . . We do not think that the facts that the corporation is insolvent, that its affairs are in inextricable confusion, and that it has preferred certain creditors, necessarily require the appointment of a receiver. In such a case the insolvent law of this State affords a complete remedy, and the failure of the parties to avail themselves of it does not of itself furnish a sufficient reason for the appointment of a receiver."[1641]

The U. S. bankruptcy act of 1898 caused the State insolvent law to cease to operate after July 1, 1898.[1642] Under the bankruptcy act a corporation cannot file a voluntary petition,[1643] though it seems it may induce its creditors to file an involuntary one.[1644] And even an involuntary petition cannot be filed against a corporation unless it is engaged in manufacturing, trading, printing, publishing, mining, or mercantile pursuits.[1645]

The net result of this is that, as to certain kinds of corporations, the argument that a receiver will not be appointed because the insolvency law covers the ground no longer applies, and it is assumed that in future the courts may be more ready to appoint receivers than formerly.

[1641] Falmouth Bank v. Cape Cod Ship Canal Co., 166 Mass. 550, 568, per Morton, J.; Pond v. Framingham, etc., R. Co., 130 Mass. 194.

[1642] Parmenter Manuf. Co. v. Hamilton, 172 Mass. 178. This was a case of an involuntary petition in insolvency against the plaintiff corporation.

[1643] Act July 1, 1898, § 4a.

[1644] Re Marine, etc., Co., 91 Fed. Rep. 630. Cf. Re Bates Machine Co., 91 Fed. Rep. 625.

[1645] Act July 1, 1898, § 4b; Act of Feb. 9, 1903, c. 487; Re Keystone Coal Co., 109 Fed. Rep. 872. See supra, § 36, c.

A bill by a stockholder, asking for a receiver on account of the mismanagement of officers, must be brought for the benefit of all having like interests with himself, or they must be made defendants, and if they are too numerous to be made parties, enough must be joined to represent the stockholders as a class.[1648]

A receiver may be appointed here to take possession of and to distribute all assets whether within or without the Commonwealth, and creditors in other States may present and prove their claims before him.[1649]

It is provided by statute that "upon an appeal from a final decree, the justice of either court by whom it was made may make such orders for the appointment of receivers, and of injunction or prohibition, or for continuing the same in force, as are needful for the protection of the rights of the parties, until the appeal shall be heard by the full court; subject, however, to be modified or annulled by the order of the full court upon motion after the appeal is taken." [1650]

Receivers may also be appointed where a cause in equity is removed from the Superior to the Supreme Judicial Court.[1651]

A receivership is not to be regarded as an ordinary incident of the proceedings to collect a debt;[1652] and, in respect to the collection of debts due a defendant from persons in foreign jurisdictions, there is no precedent for the appointment of a receiver in a suit brought by a judgment creditor under the general equity jurisdiction.[1653]

Nor will a receiver ordinarily be appointed here for a foreign corporation, on a bill to enjoin *ultra vires* acts of directors and compel them to account for misappropriation of funds,

[1648] Davis v. Peabody, 170 Mass. 397.

[1649] Garham v. Mutual Aid Society, 161 Mass. 357. Cf., as to mutual benefit associations, Buswell v. Iron Hall, 161 Mass. 224.

[1650] R. L., c. 159, § 21; St. 1883, c. 223, § 2; Pub. St., c. 151, § 15; Gen. St., c. 113, § 9; St. 1859, c. 237, § 3.

[1651] R. L., c. 159, § 30; St. 1883, c. 223, § 8.

[1652] Falmouth Bank v. Cape Cod Ship Canal Co., 166 Mass. 550, 569; Hollins v. Brierfield, etc., Iron Co., 150 U. S. 371.

[1653] Amy v. Manning, 149 Mass. 487, 489. Cf., as to winding up a partnership, Harvey v. Varney, 104 Mass. 436, 443. Generally, as to rights of receiver, Booth v. Clark, 17 How. 322.

as the court has no jurisdiction to dissolve the corporation or to wind up its affairs.[1654]

b. Effect of appointment.

In general, the rights of the parties are to be adjusted as of the date of the filing of the bill or of the issuing of the injunction.[1655] But, in a bill brought under general equity powers, the date of the appointment of the receiver will be the date of adjustment where circumstances make it more equitable.[1656] The custody of the receiver relates back to this date. Therefore, intermediate attachments of the property of the corporation have always been invalid,[1657] and a chattel mortgage made before but recorded after the appointment of a receiver is likewise invalid.[1658] Attachments made before the application for a receiver were formerly not dissolved by his subsequent appointment,[1659] but the matter is now governed by the following sections of statute:

"An attachment of property on mesne process shall be dissolved by the appointment by any court of competent jurisdiction in this commonwealth of a receiver to take possession of such property, if the bill or petition praying for the appointment of such receiver is filed in said court within four months after such attachment was made, unless the court at any time, in its discretion, continues such attachment for the benefit of the estate of the defendant. In such

[1654] Richardson v. Clinton Wall Trunk Co., 181 Mass. 580.

[1655] Cases of statutory jurisdiction: Atlas Bank v. Nahant Bank, 23 Pick. 480; Colt v. Brown, 12 Gray, 233; Burdon v. Massachusetts Safety Fund Association, 147 Mass. 360; Merrill v. Commonwealth Ins. Co., 166 Mass. 238; Williams v. United Reserve Fund Associates, 166 Mass. 450; Merrill v. Commonwealth, etc., Ins. Co., 171 Mass. 81; Atty. Gen. v. Mass. Benefit Assoc., 171 Mass. 193. Cases under general equity powers: Fogg v. United Order of the Golden Lion, 156 Mass. 431; Garham v. Mutual Aid Society, 161 Mass. 357.

[1656] Jones v. Arena Publishing Co., 171 Mass. 22, 27.

[1657] Atlas Bank v. Nahant Bank, 23 Pick. 480.

[1658] Harrison v. Warren Co., 183 Mass. 123.

[1659] Hubbard v. Hamilton Bank, 7 Met. 340. Cf. Atlas Bank v. Nahant Bank, 23 Pick. 480; Taylor v. Columbian Ins. Co., 14 Allen, 353; Folger v. Columbian Ins. Co., 99 Mass. 267; Buswell v. Iron Hall, 161 Mass. 224, 232; Kittredge v. Osgood, 161 Mass. 384; Kilborn v. Lyman, 6 Met. 299; Davenport v. Tilton, 10 Met. 320, 325; Hills v. Parker, 111 Mass. 508; Columbian Book Co. v. De Golyer, 115 Mass. 67, 69; Sage v. Heller, 124 Mass. 213.

case, the court may authorize the receiver to prosecute the action upon which the attachment was made for the benefit of the estate of the defendant and may make further orders to enable the receiver to recover for the benefit of the estate of the defendant the amount due to the plaintiff in the original action." [1660]

"If an attachment has been dissolved in the manner provided in the preceding section, the proceedings for the appointment of a receiver shall not thereafter be dismissed and the receiver discharged until all the assets which have come into his hands as receiver have been fully distributed or the claim upon which the attachment was made has been fully paid and discharged, unless the debtor, before such dismissal, deposits with the officer who made the attachment such amount of money as the court before which such receivership proceedings are pending, after notice to the attaching creditor and a hearing, finds reasonable for the protection of his claim in the action in which the attachment was made. Such money shall be held by the officer in place of the property held under the attachment before its dissolution and shall be disposed of as such property would have been disposed of had the attachment not been dissolved." [1661]

The powers of a receiver extend to all the real and personal property of the corporation;[1662] but the title to the property remains in the corporation, and the custody of the receiver is that of the court appointing him,[1663] so that any rights in such property can be asserted only by application to that court.[1664] This last principle, however, does not apply to property to which the corporation never had any title, and the receiver is liable in any appropriate action for meddling with such property.[1665]

From the fact that the title to corporate property remains in the corporation, it follows that a receiver who takes possession of a leasehold of the corporation is not an assignee of the term, and is not liable on the covenants of the lease, but only for a

[1660] R. L., c. 167, § 126; St. 1898, c. 420, § 1.

[1661] R. L., c. 167, § 127; St. 1898, c. 420, § 2.

[1662] Atlas Bank v. Nahant Bank, 23 Pick. 480.

[1663] Harrison v. Warren Co., 183 Mass. 123; Ellis v. Boston, Hartford & Erie R. Co., 107 Mass. 1, 28; Bell v. American Protective League, 163 Mass. 558, 562; Com. v. Gould, 118 Mass. 300, 307; Hills v. Parker, 111 Mass. 508; Hayward v. Leeson, 176 Mass. 310, 325; Union Bank v. Kansas City Bank, 136 U. S. 223, 236.

[1664] Hills v. Parker, 111 Mass. 508.

[1665] Hills v. Parker, 111 Mass. 508.

reasonable sum for use and occupation during such time as he retains possession.[1666]

The corporation continues its corporate life during the receivership. It can hold an election,[1667] or take steps to effect a reorganization,[1668] and is liable to taxation.[1669]

c. Suits by and against receivers.[1670]

Receivers appointed under this section are expressly given power to prosecute and defend suits. "A receiver of a corporation appointed by a court of equity cannot bring suits in his own name to recover property of the corporation which has never been in his possession, unless he is authorized so to do by statute, or by the decree of a court competent to give him such authority, or unless the title to the property has been conveyed to him."[1671] But if a suit has been brought by a receiver without authority, it may be amended by substituting the name of the corporation.[1672] And it is usual in the decree to give receivers power to prosecute suits in their own names to convert the property of the corporation into cash.[1673]

[1666] Bell v. American Protective League, 163 Mass. 558. Cf. Commonwealth v. Franklin Ins. Co., 115 Mass. 278, 281, where the receiver made an express contract himself with the lessor.

[1667] Lehigh, etc., Navigation Co. v. Central R. Co., 5 N. J. L. J. 214.

[1668] Linn v. Joseph Dixon Crucible Co., 59 N. J. L. 28.

[1669] Kirkpatrick v. Assessors, 57 N. J. L. 53.

[1670] As to the effect of the appointment of a receiver on pending attachments, see supra, under *b*.

[1671] Wilson v. Welch, 157 Mass. 77, 80, 31 N. E. Rep. 712, per Field, C. J.; Fort Payne. etc., Iron Co. v. Webster, 163 Mass. 134; Hayward v. Leeson, 176 Mass. 310, 325. Cf. Farmers', etc., Bank v. Jenks, 7 Met. 592; Boot & Shoe, etc., Ins. Co. v. Melrose Congregational Society, 117 Mass. 199; Sohier v. Lamb, 134 Mass. 275; Parker v. Nickerson, 137 Mass. 487; Ewing v. King, 169 Mass. 97.

Where a statute makes a liability of stockholders directly to creditors, such liability does not pass to a receiver, as an asset of the corporation. Hancock National Bank v. Ellis, 166 Mass. 414, 419; Ibid., 172 Mass. 39, 49; National Bank of Barre v. Hingham Mfg. Co., 127 Mass. 563, 567; Chamberlain v. Huguenot Manuf. Co., 118 Mass. 532.

[1672] Wilson v. Welch, 157 Mass. 77, 31 N. E. Rep. 712; Merchants' Bank v. Stevenson, 7 Allen, 489; Byers v. Franklin Coal Co., 106 Mass. 131; Buckland v. Green, 133 Mass. 421; Costelo v. Crowell, 134 Mass. 280; Pierce v. Charter Oak Ins. Co., 138 Mass. 151. See R. L., c. 173, § 48.

[1673] Wilson v. Welch, 157 Mass. 77, 80; Bliss v. Parks, 175 Mass. 539.

A receiver may bring a bill against the officers and agents of the corporation for discovery, accounting and the payment to him of all moneys in excess of reasonable compensation and expenses, for damages sustained by the corporation by reason of fraud and mismanagement on their part.[1674] He may likewise maintain a bill to restrain the foreclosure of a mortgage and for the surrender of the mortgage where made by the fraud of an officer of the corporation.[1675]

A receiver is not estopped to sue to recover a note belonging to a corporation by reason of the fact that the corporation has unlawfully invested its funds therein.[1676] Nor is he estopped from recovering money due from an officer of the corporation by reason of the acceptance by the directors of the report of an auditing committee based on fictitious entries on the corporation's books.[1677]

"The appointment of a receiver is not a bar to suits brought against the corporation before the bill in this case was filed, nor do such suits abate in consequence of such appointment. The receiver can appear in and defend the suits if the interests which he represents render it proper or necessary."[1678]

Formerly, after receivers had been appointed, neither the receivers nor the corporation could be charged in trustee process.[1679] But it was afterwards provided by statute that —

"Funds, credits or dividends which are due from or in the hands of receivers appointed by a court may be so attached after an order has been made for their distribution."[1680]

Before such an order is made the funds cannot be reached. Nor can they be reached by a petition upon the equity side of the court in the cause in which the receivers were appointed, by creditors of creditors. "The property of the corporation

[1674] Bliss v. Parks, 175 Mass. 539.
[1675] Holden v. Hoyt, 134 Mass. 181.
[1676] Holden v. Upton, 134 Mass. 177.
[1677] Parker v. Nickerson, 137 Mass. 487, 495.
[1678] Kittredge v. Osgood, 161 Mass. 384, 387, per Field, C. J.
[1679] Columbian Book Co. v. De Golyer, 115 Mass. 67, 69. Cf. Commonwealth v. Hide & Leather Ins. Co., 119 Mass. 155.
[1680] R. L., c. 189, § 22; Pub. St., c. 183, § 24; St. 1881, c. 123.

is entrusted to the receivers by the authority of the law, for the purpose of distribution among the creditors of the corporation, not among creditors of those creditors. To undertake to determine, as incidental to the administration of the estate of the corporation, the validity and equity of the claims of every creditor of the corporation would unreasonably embarrass and delay the distribution of the estate and the settlements of the accounts of the receivers." [1681]

In ascertaining the amount due to any creditor of the corporation, the court will follow in general the rules of bankruptcy and insolvency.[1682] "Equitable rights which it is contended are superior to the title made by order of the court can be passed upon only in the cause in which that title is created, and cannot be set up in an independent suit." [1683]

Legal rights are usually to be determined in an action at law brought against the receiver by leave of the court appointing him.[1684] One injured by the negligence of a receiver or of his employees must generally apply to the court for redress, and is not usually entitled to sue as matter of right. The court may either hear the case itself or send it to a jury.[1685] In some cases, however, it is not necessary to ask the leave of the court to bring an action. Thus an action can be brought, without leave, against receivers who are operating a railroad for damages from fire caused by locomotives,[1686] and a receiver can be sued without leave for acts done by his predecessor,[1687] or for negligence causing death.[1688] Similarly, an action of re-

[1681] Com. v. Hide & Leather Ins. Co., 119 Mass. 155, 157, per Gray, C. J. It had been previously suggested that such a petition in equity might lie. Columbian Book Co. v. De Golyer, 115 Mass. 67, 70.

[1682] Com. v. Hide & Leather Ins. Co., 119 Mass. 155; Com. v. Shoe, etc., Dealers' Ins. Co., 112 Mass. 131.

[1683] Porter v. Kingman, 126 Mass. 141, 142, per Soule, J.; Atlas Bank v. Nahant Bank, 23 Pick. 480; Columbian Book Co. v. De Golyer, 115 Mass. 67.

[1684] Cf. Re Whittemore, 157 Mass. 46.

[1685] Klein v. Jewett, 26 N. J. Eq. 474.

[1686] Wall v. Platt, 169 Mass. 398. Cf. Nichols v. Smith, 115 Mass. 332.

[1687] McNulta v. Lochridge, 141 U. S. 327.

[1688] Texas, etc., R. Co. v. Cox, 145 U. S. 593. Cf. Texas, etc., R. Co. v. Johnson, 151 U. S. 81.

plevin can be brought without leave for chattels which have never belonged to the corporation.[1689]

Foreign receivers running a railroad in this State, who are liable to actions at law in the appointing State, are equally liable in this State; and so the general rule, that they are liable solely to the court by which they are appointed, does not apply.[1690]

While the receiver is in charge, the corporation is not itself liable for accidents;[1691] and neither is a new corporation to which the property has been turned over by the receivers liable for accidents occurring during the receivership.[1692]

"If it is alleged in an action at law or suit in equity that a party is . . . a receiver . . . such allegation shall be taken as admitted unless the party controverting it files in court, within the time allowed for the answer thereto, or within ten days after the filing of the paper which contains such allegation, a special demand for its proof." [1693]

d. Duties and powers of receivers.

The general powers and duties of a receiver have been described by the court as follows:[1694] "The decree appointing receivers gave no priority or superiority of right to the parties upon whose application or in whose behalf it was made. It had no effect to change the title or create any lien upon the property. Its purpose, like that of an injunction *pendente lite,* was merely to preserve the property until the rights of all parties could be adjudged. The receivers are officers of the courts for this purpose, and act under its direction and control. They continue the operation of the [corporation] and the conduct of its business, because this is essential to its proper preservation. They may fulfil the contracts of the corporation so far as beneficial. They may not pay its debts, nor fulfil contracts which are burdensome or tend to diminish the value

[1689] Hills v. Parker, 111 Mass. 508; Porter v. Kingman, 126 Mass. 141.
[1690] Paige v. Smith, 99 Mass. 395.
[1691] Bell v. Indianapolis, etc., R. Co., 53 Ind. 57.
[1692] Archambeau v. New York, etc., R. Co., 170 Mass. 272.
[1693] R. L., c. 173, § 123; Pub. St., c. 167, § 87; St. 1881, c. 113.
[1694] Ellis v. Boston, Hartford & Erie R. Co., 107 Mass. 1, 28, per Wells, J.

of the property in their control, unless such contracts are charged as incumbrances upon the property, or are necessary to its proper preservation and security. They are entitled to the repayment of their reasonable expenses and charges in preference to all other claims upon the property of whatever nature."

A receiver who desires to expend money for any other purpose than the actual preservation of the property under his charge, should apply to the court for authority; otherwise he has no power to incur the expense.[1695] And the court will not authorize him to go outside the scope of the receivership, as by paying the expenses of a reorganization.[1696] The receiver may apply to the court for increased powers or the court may increase them of its own motion.[1697]

A receiver is entitled to the books and papers of the corporation,[1698] but whether any stockholder may thereupon inspect them is a question for the court.[1699]

A receiver may adopt contracts made by the corporation, and if he does so, sums becoming due thereon after his adoption are part of his expenses, and the other party is a preferred creditor to that extent.[1700]

Generally, receivers "take the property subject to the performance of the contracts entered into by the corporation, and subject to liens arising from contracts made by it.[1701] They are not the servants or agents of the corporation, but for some purposes at least their possession may be said to be in a sense its possession, and they succeed for the time being, by virtue of

[1695] Cowdrey v. Galveston, etc., R. Co., 93 U. S. 352 (expense in preventing parallel road disallowed); Raht v. Attrill, 106 N. Y. 423; Vilas v. Page, 106 N. Y. 439; Vanderbilt v. Central R. Co., 43 N. J. Eq. 669; Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554.

[1696] Central Trust Co. v. Wabash, etc., R. Co., 25 Fed. Rep. 69.

[1697] State v. New Orleans, 106 La. 469.

[1698] Engel v. South Metropolitan, etc., Co., L. R. [1892] 1 Ch. 442.

[1699] Fowler's Petition, 9 Abb. N. C. 268; Chable v. Nicaraugua Canal Co., 59 Fed. 846.

[1700] 3 Cook on Corp., 5th ed., § 874.

[1701] Kneeland v. American Loan & Trust Co., 136 U. S. 89, 97; Williams v. Clark, 140 Mass. 238. But see United States Trust Co. v. Wabash Western R. Co., 150 U. S. 287, 299 et seq.; Quincy, etc., R. Co. v. Humphreys, 145 U. S. 82.

their appointment and authority, to many of its most important powers, privileges and obligations." [1702]

Settlements by receivers.

It is provided by statute that:

"The following claims shall, in the settlement of estates by receivers, be entitled to priority in the order named:

"First. Debts due to the United States, or debts due to, or taxes assessed by, this commonwealth or a county, city or town herein.

"Second. Wages to an amount of not more than one hundred dollars due to an operative, clerk or servant for labor, either performed within one year last preceding the appointment of the reciever or for the payment for which a suit, which was commenced within one year after the performance of the labor, is pending or was terminated within one year after said appointment.

"Third. Debts to an amount of not more than fifty dollars due to physicians for medical attendance on the debtor or his family, which were rendered within six months prior to said appointment." [1703]

It seems that water rates of a municipality are included under "taxes" in the first clause of the statute.[1704] The provisions in the first two clauses of the statute were to some extent declaratory of the common law.[1705]

Where a creditor has caused a receiver to be appointed and has assented to a sale of assets, he cannot ask other creditors and the receiver to await the determination in another State of the amount of a claim of his, there in litigation.[1706]

e. Liability of receivers.

Actions against a receiver are against him in his official capacity, and judgments against him in such capacity are payable only from the funds in his hands; he is not liable personally.[1707]

[1702] Wall v. Platt, 169 Mass. 398, 401, per Morton, J.

[1703] R. L., c. 150, § 29; St. 1897, c. 400, cited in Waite v. Worcester Brewing Co., 176 Mass. 283; Jones v. Arena Publishing Co., 171 Mass. 22.

[1704] Waite v. Worcester Brewing Co., 176 Mass. 283. Cf. Jones v. Arena Publishing Co., 171 Mass. 22.

[1705] See Jones v. Arena Publishing Co., 171 Mass. 22. Note dissenting opinion, p. 29.

[1706] New York Bank Note Co. v. Kidder Press Manuf. Co., 176 Mass. 151.

[1707] Texas, etc., R. Co. v. Cox, 145 U. S. 593; Cardot v. Barney, 63 N. Y. 281; Little v. Dusenbury, 46 N. J. L. 614, 638.

The giving of a bond by a receiver is a matter resting in the discretion of the court.[1708] Where no bond is given at the time of appointment, any interested party may apply to have one ordered.[1709]

A receiver is liable for the return of money borrowed of the company before his appointment, and for a breach of this duty the sureties upon his bond are liable.[1710] In such a case the sureties' liability cannot be reduced by sums not yet liquidated, but owing the receiver for services.[1711] And an order of court that the receiver pay a certain sum is evidence as against the receiver and his sureties, both of a breach of the bond and of the amount of liability.[1712] Where the decree appointing a receiver does not require him to give a bond, the fact that he has not given one is no defence to the suit; any person interested can apply to the court to have a bond given.[1713]

Where sureties have been compelled to pay in an action on the bond, and afterward compensation is allowed to the receiver, it may be applied, on petition, to the indemnity of the sureties.[1714]

If two receivers are appointed, and one misappropriates the funds by using them for his own profit, and the other is guilty of gross neglect of his duties, giving no attention to the matters entrusted to his care and supervision, they are jointly liable for the balance found on stating their account, and are chargeable with interest.[1715]

"A receiver . . . appointed by a court of record who embezzles or fraudulently converts, or fraudulently takes or secretes with intent so to do, effects or property which is in his possession by virtue of such appointment shall be guilty of larceny, and shall be punished by imprisonment in the state prison for not more than ten years, or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two years." [1716]

[1708] Wilson v. Welch, 157 Mass. 77, 82.
[1709] Ibid.
[1710] Commonwealth v. Gould, 118 Mass. 304.
[1711] Ibid.
[1712] Com. v. Gould, 118 Mass. 304.
[1713] Wilson v. Welch, 157 Mass. 81, 31 N. E. Rep. 712.
[1714] Com. v. Gould, 118 Mass. 304.
[1715] Com. v. Eagle Ins. Co., 14 Allen, 344.
[1716] R. L., c. 208, § 46; Pub. St., c. 203, § 45; St. 1874, c. 79.

f. Compensation of receivers.

Receivers are entitled to their reasonable expenses and charges, in preference to all other claims upon the property, of whatever nature.[1717]

Such compensation is fixed by the appointing court, in accordance with the degree of responsibility and business ability required and the difficulty involved;[1718] but it is not to be determined by any fixed commission on the amount of money passing through the receiver's hands.[1719]

In a proper case an allowance will be made to the receiver for counsel fees.[1720]

The question as to the allowance to be made to a receiver must be determined in the cause in which he was appointed, and cannot be considered in a suit upon the receiver's bond.[1721]

g. Foreign receivers.

A claim by a foreign receiver of a foreign corporation, having its principal place of business in another State, for a stock subscription is a claim for a debt, and a bill in equity will not lie to compel its payment.[1722] Nor can a creditor of a foreign corporation, who has joined with others in a creditors' suit in another State in which a receiver has been appointed, maintain a suit of equitable attachment here.[1723]

Further, when a foreign receiver of a foreign corporation has been appointed, and intervenes as claimant in a trustee process brought here, after a voluntary assignment to the receiver, by a foreign plaintiff, the court here will not protect such plaintiff but will order the property turned over to the receiver.[1724]

In general, a foreign receiver has no right to sue here in his

[1717] Ellis v. Boston, etc., R. Co., 107 Mass. 1, 28; Jones v. Keen, 115 Mass. 170.

[1718] Stuart v. Boulware, 133 U. S. 78, 82; Jones v. Keen, 115 Mass. 170.

[1719] Jones v. Keen, 115 Mass. 170; Grant v. Bryant, 101 Mass. 567.

[1720] Stuart v. Boulware, 133 U. S. 78; Jones v. Keen, 115 Mass. 170.

[1721] Com. v. Gould, 118 Mass. 300.

[1722] Andrews v. Moen, 162 Mass. 294.

[1723] Gerding v. East Tennessee Land Co., 185 Mass. 380.

[1724] Witters v. Globe Savings Bank, 171 Mass. 425; Buswell v. Iron Hall, 161 Mass. 224. Cf. Bagby v. Atlantic, etc., R. Co., 86 Pa. St. 291.

own name on a debt due the corporation, unless he is actually or virtually an assignee of the claim which he seeks to enforce.[1725]

A foreign receiver appointed by a court of competent jurisdiction has a standing to intervene and be heard here in a proceeding for the appointment of a domestic receiver of the property of the corporation found here;[1726] and, if the property is in the foreign jurisdiction, a receiver here will not be appointed as against one there.[1727]

In general, foreign receivers have no better standing in the courts of this Commonwealth, than they would have in the courts of their own State. Therefore, where they are liable as common carriers to other courts of their own State than the one appointing them, they will be liable also in Massachusetts.[1728]

Where a receiver has been appointed by the court of a foreign chartering State, creditors here must have their rights determined by such court, and cannot invoke the aid of the courts here.[1729]

§ 54. Payment of debts and distribution of surplus.

"The receivers shall pay all debts due from the corporation if the funds in their hands are sufficient therefor; and if they are not, they shall distribute them ratably among the creditors who prove their debts in the manner directed by any decree of the court for that purpose. If there is a balance remaining after the payment of the debts, the receivers shall distribute and pay it to those who are justly entitled thereto as having been stockholders of the corporation, or their legal representatives." [1730]

[1725] Homer v. Barr Pumping Engine Co., 180 Mass. 163, citing Amy v. Manning, 149 Mass. 487; Wilson v. Welch, 157 Mass. 77; Buswell v. Iron Hall, 161 Mass. 224; Fort Payne Coal, etc., Co. v. Webster, 163 Mass. 134; Ewing v. King, 169 Mass. 97; Howarth v. Lombard, 175 Mass. 570; Hayward v. Leeson, 176 Mass. 310, 325.

[1726] Buswell v. Iron Hall, 161 Mass. 224.

[1727] Harvey v. Varney, 104 Mass. 436 (case of partnership). See Irwin v. Granite State, etc., Ass'n, 56 N. J. Eq. 244.

[1728] Paige v. Smith, 99 Mass. 395.

[1729] Union Cattle Co. v. International Trust Co., 149 Mass. 492, 499.

[1730] St. 1903, c. 437, § 54; R. L., c. 110, § 55; Pub. St., c. 105, § 44; Gen. St., c. 68, § 39; St. 1852, c. 55, § 2; Rev. St., c. 44, § 10; St. 1833, c. 145.

Receivers are to distribute the funds of insolvent corporations ratably among all the creditors.[1731] If there is not in any case sufficient cash assets to pay all the debts, as by the statute they are to pay "all debts" of the corporation, they have the power to convert the property of the corporation into cash, and for this purpose an order of the court is usually obtained.[1732]

Query, whether a general creditor of a dissolved corporation, who has not proved his claim within the time fixed by the order of the court, can, after the "balance remaining" has been distributed by the receivers among the stockholders, have any remedy against the stockholders.[1733]

A dividend in liquidation, representing in part undivided earnings, paid upon surrender of certificates is capital and not income, as regards trust estates.[1734]

§ 55. Returns of dissolution.

"If a corporation is dissolved or annulled the clerk of the court in which the decree therefor has been entered shall forthwith make return thereof to the secretary of the commonwealth, giving the name of the corporation dissolved or annulled and the date upon which such decree was entered." [1735]

J. FOREIGN CORPORATIONS.[1736]

§ 56. Foreign corporations defined.

"The term 'foreign corporation' as used in this act shall mean every corporation, association or organization which has been

Citations. — Gen. St., c. 68, § 39: In re New South Meeting House in Boston, 13 Allen, 504; Sohier v. Lamb, 134 Mass. 279.

Rev. St., c. 44, § 10: Atlas Bank v. Nahant Bank, 23 Pick. 487; Atlas Bank v. Nahant Bank, 3 Met. 582; Baker v. Atlas Bank, 9 Met. 182; Stockholders of Cochituate Bank v. Colt, 1 Gray, 387.

St. 1833, c. 145: In re Eastern R. R. Co., 120 Mass. 413. This section is the same as in the Revised Laws.

[1731] Cochituate Bank v. Colt, 1 Gray, 382, 387.

[1732] Atlas Bank v. Nahant Bank, 23 Pick. 480, 489.

[1733] Sohier v. Lamb, 134 Mass. 279.

[1734] Gifford v. Thompson, 115 Mass. 478.

[1735] St. 1903, c. 437, § 55; R. L., c. 109, § 57; Pub. St., c. 105, § 45; St. 1880, c. 157. Not cited to 193 Mass, incl. This section is the same as in the Revised Laws.

[1736] As to the taxation of foreign corporations, see infra, § 75.

established, organized or chartered under laws other than those of the commonwealth for purposes for which domestic corporations may be organized under the provisions of section seven."[1737]

a. History of statutes relating to foreign corporations.

Section 56 of the present act is substantially the same as in the Revised Laws.

It will be noted that R. L., c. 126, dealing with foreign corporations, is practically entirely superseded by the present act, the only sections of that chapter left untouched by the present act being sections 3 and 8, which relate to financial corporations; although, in terms, R. L., c. 126, is repealed only so far as inconsistent with the present act.[1738]

The earlier statutory provisions applied only to foreign corporations properly so-called. Thus, it was held that a partnership association founded under the laws of Pennsylvania was not a corporation, and could not be sued as such in Massachusetts.[1739] The same rule was applied to joint stock associations formed under the laws of New York.[1740] In one case, the

As to a foreign corporation becoming also a domestic corporation, see 13 Harvard Law Review, 597; St. Louis v. San Francisco R. Co., 161 U. S. 545; Graham v. Boston, Hartford & Erie R. Co., 118 U. S. 161; Chicago & North Western R. Co. v. Auditor-General, 53 Mich. 79; Commonwealth v. Chesapeake, etc., R. Co., 27 Ky. L. Rep. 1084; Debrunn v. Southern, etc., Tel. Co., 126 N. Car. 831.

As to the jurisdiction of the courts over foreign corporations, see infra, § 62.

As to the dissolution of corporations by the chartering State, see supra, § 51, *d*.

As to the taxation of stockholders in foreign corporations, see supra, § 71, *e*.

[1737] St. 1903, c. 437, § 56; R. L., c. 126, § 1. See Edwards v. Warren Linoline, etc., Works, 168 Mass. 564, 47 N. E. Rep. 502.

[1738] St. 1903, c. 437, § 95.

[1739] Edwards v. Warren Linoline, etc., Works, 168 Mass. 564, 47 N. E. Rep. 502; Eliot v. Himrod, 108 Pa. St. 569; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. Rep. 397.

[1740] Edwards v. Warren Linoline, etc., Works, 168 Mass. 564, 47 N. E. Rep. 502; Taft v. Ward, 106 Mass. 518, 111 Mass. 518; Bodwell v. Eastman, 106 Mass. 525, 526; Gott v. Dinsmore, 111 Mass. 45, 51; Boston & Albany Railroad v. Pearson, 128 Mass. 445. Cf. Frost v. Walker, 60 Me. 468; Dinsmore v. Philadelphia, etc., R. R. Co., 11 Phila. 483; Waterbury v. Merchants' Union Expres Co., 50 Barb. 157; Robbins v. Wells, 1 Robertson, 666. Contra, Edgeworth v. Wood, 58 N. J. L. 463, 33 Atl. Rep. 940.

Supreme Court of the United States took the view that an English joint stock company was sufficiently an artificial body to be subject to taxation in this State,[1741] but the statute imposing the tax in this case referred to companies "incorporated or associated under the laws of any government or state other than one of the United States." [1742]

At common law, a joint stock company formed for business purposes was considered in this commonwealth merely as a partnership.[1743]

b. Right to impose conditions on foreign corporations.

Provided it does nothing contrary to the constitution or laws of the United States, "the general right of a State to prescribe the terms and conditions on which a foreign corporation may do business therein is unquestioned," and this right includes regulating the service of process upon such corporation, or prohibiting it and its agents from doing business at all within the State.[1744]

[1741] Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566. Cf. Oliver v. Liverpool & London Ins. Co., 100 Mass. 531.

[1742] St. 1862, c. 224, § 11.

[1743] Tappan v. Bailey, 4 Met. 529; Tyrrell v. Washburn, 6 Allen, 466; Edwards v. Warren Linoline, etc., Works, 168 Mass. 564, 47 N. E. Rep. 502.

[1744] Attorney-General v. Electric Storage Battery Co., 188 Mass. 239, 240, per Knowlton, C. J.; Scollard v. American Felt Co., 194 Mass. 127; Attorney-General v. Bay State Mining Co., 99 Mass. 149, 153; Reyer v. Odd Fellows' Accident Assoc., 157 Mass. 367, 373; Aldrich v. Blatchford, 175 Mass. 369, 371; Commonwealth v. Nutting, 175 Mass. 154; Gibson v. Manufacturers' Ins. Co., 144 Mass. 81; Gillespie v. Commercial Ins. Co., 12 Gray, 201; National Bank of Commerce v. Huntington, 129 Mass. 444, 449; Johnston v. Trade Ins. Co., 132 Mass. 432; Wilson v. Martin-Wilson, etc., Alarm Co., 149 Mass. 24; Oliver v. Liverpool, etc., Ins. Co., 100 Mass. 531, 538; 1 Op. Atty.-Gen. 583; Old Wayne Life Ass'n v. McDonough, 204 U. S. 8; Blake v. McClung, 172 U. S. 239; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28; Hooper v. California, 155 U. S. 648; Doyle v. Continental Ins. Co., 94 U. S. 535; Horn Silver Mining Co. v. New York, 143 U. S. 305; Philadelphia Fire Association v. New York, 119 U. S. 110; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Railroad Co. v. Koontz, 104 U. S. 5, 11; Ex parte Schollenberger, 96 U. S. 369; Ins. Co. v. Morse, 20 Wall. 445; Duert v. Chicago, 10 Wall. 416; Paul v. Virginia, 8 Wall. 168; Lafayette Ins. Co. v. French, 18 How. 404; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

And a corporation is not a citizen of a State within the meaning of article IV, section 2, of the Constitution of the United States, which secures to the citizens of each State the privileges and immunities of the citizens of the several States.[1745]

By doing business within a foreign State, a corporation subjects itself to the statutes of that State, and impliedly agrees to be bound by them.[1746] Such regulations do not, however, give the foreign corporation a domicile within this State, for a corporation can have its domicile only in the State which created it.[1747]

c. Corporations engaged in interstate commerce.

An exception to the general principle, that a State may prescribe the terms upon which a foreign corporation may do business within the State, occurs in the case of corporations engaged wholly in interstate commerce. As to such corporations, the Commonwealth cannot enjoin them from doing business, nor do more than regulate them under the police power.[1748]

This is *a fortiori* true where the corporation's charter recites that it contemplates doing business in another State. Pinney v. Nelson, 183 U. S. 144.

[1745] Attorney-General v. Electric Storage Battery Co., 188 Mass. 239; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Paul v. Virginia, 8 Wall. 168; Reyer v. Odd Fellows' Accident Assoc., 157 Mass. 367, 373.

As to the effect of art. IV, § 1, of the Constitution of the United States, requiring that full faith shall be given in each State to the public acts, records and judicial proceedings of every other State, see Gillespie v. Commercial Ins. Co., 12 Gray, 201.

[1746] Scollard v. American Felt Co., 194 Mass. 127; Rothrock v. Dwelling House Ins. Co., 161 Mass. 423, 425; Horn Silver Mining Co. v. New York, 143 U. S. 305, 315, and cases in notes, supra.

[1747] Bergner, etc., Brewing Co. v. Dreyfus, 172 Mass. 154, 158; Boston Investment Co. v. Boston, 158 Mass. 461, 462, 463; Shaw v. Quincy Mining Co., 145 U. S. 444, 450; Martine v. International Ins. Co., 53 N. Y. 339, 346.

[1748] 2 Op. Atty.-Gen. 440; Attorney-General v. Electric Storage Battery Co., 188 Mass. 239; Com. v. Petranich, 183 Mass. 217, 219; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Western Union Telegraph Co. v. Mass., 125 U. S. 530, 554; Norfolk & Western R. Co. v. Pennsylvania, 136 U. S. 114; Crutcher v. Kentucky, 141 U. S. 47; Robbins v. Shelby County, 120 U. S. 489; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727; Pickard v. Pullman Southern Car Co., 117 U. S. 34; Leloup v. Mobile, 127 U. S. 640; Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692.

But if a foreign corporation does both an interstate and a local business, the State may regulate it like other foreign corporations.[1749]

d. Corporations covered by the act.

The only foreign corporations to which sections 56–70 and 75 apply, are those chartered by other States or countries for the purposes for which a domestic corporation might be organized under sections 1 and 7.

The facts that a foreign educational corporation leases property here, and repairs it, and has a representative in liquor licenses issued for the property, do not make it a business corporation.[1750]

§ 57. Limitation of business.

"No such foreign corporation shall engage or continue in any kind of business in this commonwealth the transaction of which by domestic corporations is not permitted by the laws of this commonwealth." [1751]

Thus a loan company, whose contracts mature according to the numerical order of acceptance of the contracts, cannot do business in this Commonwealth, such business being forbidden by law.[1752]

On the other hand, if the business which the corporation is doing within this State is of a kind which is permitted by law, the facts that it is authorized by its charter to do and is doing elsewhere other business,[1753] or that the laws of the chartering

[1749] Attorney-General v. Electric Storage Battery Co., 188 Mass. 239, 242; Osborn v. Florida, 164 U. S. 650; Pullman Co. v. Adams, 189 U. S. 420; Pennsylvania R. R. v. Knight, 192 U. S. 21; Allen v. Pullman's Palace Car Co., 191 U. S. 171; Ficklen v. Shelby County, 145 U. S. 1; Brennan v. Titusville, 153 U. S. 289; Ashley v. Ryan, 153 U. S. 436.

[1750] Tulane University v. O'Connor, 192 Mass. 428.

[1751] St. 1903, c. 437, § 57; R. L., c. 126, § 2; St. 1894, c. 381. Cited in Enterprise Brewing Co. v. Grime, 173 Mass. 256, 53 N. E. Rep. 855, overruling 1 Op. Atty.-Gen. 304. See 2 Op. Atty.-Gen. 55.

[1752] 2 Op. Atty.-Gen. 401.

[1753] 1 Op. Atty.-Gen. 181; 1 Op. Atty.-Gen. 339 (the carrying on here of a business as dealer in cigars and tobacco and as a licensed victualler, by a corporation authorized to deal wholesale in wines and liquors); 1 Op. Atty.-Gen. 115 (an insurance company authorized also to do a trust company business).

State are different from those of this Commonwealth,[1754] are immaterial.

Where a license is required to conduct the corporation's particular business in this State, and it obtains such license, and is authorized by the chartering State to do such business there, it may do it in this State.[1755]

§ 58. Appointment of attorney.

"Every such foreign corporation which has a usual place of business in this commonwealth, or which is engaged in this commonwealth, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind, shall, before doing business in this commonwealth, in writing appoint the commissioner of corporations and his successor in office to be its true and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on it, and that the authority shall continue in force so long as any liability remains outstanding against it in this commonwealth. The power of attorney and a copy of the vote authorizing its execution, duly certified and authenticated, shall be filed in the office of the commissioner, and copies certified by him shall be sufficient evidence thereof. Service of such process shall be made by leaving a copy of the process and a fee of two dollars in the hands or in the office of the commissioner, and such service shall be sufficient service upon the corporation." [1756]

[1754] 2 Op. Atty.-Gen. 31.

[1755] Enterprise Brewing Co. v. Grime, 173 Mass. 256, 53 N. E. Rep. 855 (sale of intoxicating liquors by R. I. corporation). Cf. Bergner, etc., Brewing Co. v. Dreyfus, 172 Mass. 154, 51 N. E. Rep. 531. See also 1 Op. Atty.-Gen. 181; Cowell v. Springs Co., 100 U. S. 55.

[1756] St. 1905, c. 242; St. 1903, c. 437, § 58; R. L., c. 126, § 4; St. 1901, c. 238; St. 1899, c. 442, § 20; St. 1898, c. 474, § 15; St. 1895, c. 311; St. 1894, c. 367, § 12; c. 522, § 78, cl. 3; St. 1890, c. 421, § 17; St. 1888, c. 429, § 13; St. 1887, c. 214, § 78, cl. 3; St. 1885, c. 183, § 9; St. 1884, c. 330, §§ 1, 2, 4; St. 1882, c. 106, § 1; Pub. St., c. 73, § 3; c. 119, § 202; St. 1878, c. 36, §§ 1–5; St. 1875, c. 79; St. 1872, c. 325, § 4; St. 1871, c. 371, § 1; Gen. St., c. 58, §§ 68, 69; St. 1856, c. 252, § 46; St. 1854, c. 453, § 32; St. 1852, c. 311, §§ 2–5.

a. Construction of statute.

Provisions like those of this section are not in violation of article I, section 10, of the Constitution of the United States, as

Citations. — St. 1903, c. 437, § 58: Attorney-General v. Electric Storage Battery Co., 188 Mass. 239, 240; Tulane University v. O'Connor, 192 Mass. 433; Friedenwald Co. v. Warren, 81 N. E. Rep. 207 (Mass. 1907).

R. L., c. 126, § 4: Tulane University v. O'Connor, 192 Mass. 433.

St. 1895, c. 311: Edwards v. Warren Linoline, etc., Works, 168 Mass. 569, 47 N. E. Rep. 502.

St. 1888, c. 429, § 13: Gibson v. Order United Friends, 168 Mass. 391, 47 N. E. Rep. 101.

St. 1885, c. 183, § 9: Clarke v. Schwarzenberg, 164 Mass. 347, 41 N. E. Rep. 655. See Palmer v. Northern Mutual Relief Ass'n, 175 Mass. 396, 56 N. E. Rep. 828.

St. 1884, c. 330, § 1: Wilson v. Martin-Wilson Fire Alarm Co., 149 Mass. 26, 20 N. E. Rep. 318; Kelley v. Rice-Blake Lumber Co., 167 Mass. 29, 44 N. E. Rep. 1090; Edwards v. Warren Linoline, etc., Works, 168 Mass. 569, 47 N. E. Rep. 502; Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N E. Rep. 445; Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 156, 51 N. E. Rep. 531; Enterprise Brewing Co. v. Grime, 173 Mass. 255, 53 N. E. Rep. 855; Com. v. Corkery, 175 Mass. 461, 56 N. E. Rep. 711; Smith v. Paul Boyton Co., 176 Mass. 219, 57 N. E. Rep. 367; Healey v. Geo. F. Blake Mfg. Co., 180 Mass. 273, 62 N. E. Rep. 270. See 2 Op. Atty.-Gen. 221.

St. 1884, c. 330, § 2: Healey v. Geo. F. Blake Mfg. Co., 180 Mass. 274, 62 N. E. Rep. 270.

St. 1884, c. 330, § 4: Kelley v. Rice-Blake Lumber Co., 167 Mass. 29, 44 N. E. Rep. 1090.

St. 1882, c. 106, § 1: Edwards v. Warren Linoline, etc., Works, 168 Mass. 568, 47 N. E. Rep. 502.

Pub. St., c. 73, § 3: 2 Op. Atty.-Gen. 221.

Gen. St., c. 58, § 68: Nat. Mut. Fire Ins. Co. v. Pursell, 10 Allen, 232; Smith v. Life Ins. Co. of N. Y., 14 Allen, 340; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 103; Folger v. Columbian Ins. Co., 99 Mass. 272; Hartford Ins. Co. v. Matthews, 102 Mass. 221; Morton v. Mut. Ins. Co., 105 Mass. 141; Eastern R. R. Co. v. Relief Ins. Co., 105 Mass. 578; Thwing v. Great Western Ins. Co., 111 Mass. 93; Com. v. Goldstein, 114 Mass. 272; Johnston v. Trade Ins. Co., 132 Mass. 433; Kansas Construction Co. v. Topeka, etc., R. R. Co., 135 Mass. 40.

Gen. St., c. 58, § 69: Nat. Mut. Fire Ins. Co. v. Pursell, 10 Allen, 232; Morton v. Mut. Ins. Co., 105 Mass. 141; Eastern R. Co. v. Relief Ins. Co., 105 Mass. 578; Leonard v. Washburn, 100 Mass. 252; Com. v. Goldstein, 114 Mass. 272.

St. 1854, c. 453, § 32: Provincial Ins. Co. v. Lapsley, 15 Gray, 262; Lester v. Webb, 5 Allen, 573.

See also, generally, Gillespie v. Commercial Ins. Co., 12 Gray, 201 (as to similar statute of Maine); Desper v. Continental Water Meter Co.,

impairing the obligation of contracts.[1757] Their purpose is to "enable the courts of this State to render against a foreign corporation doing business here a general judgment valid in other jurisdictions. 'Lawful processes in any action or proceeding' manifestly refers to process emanating from court, or by the authority of a court, and cannot be understood to refer to such notices or acts *in pais* between private parties as derive no authority from a court, but simply serve to create a right of action. . . . The statute was not needed nor was it intended to aid in the creation of rights of action, and its operating force does not begin until the right exists and is to be enforced."[1758] Therefore, a notice under the employers' liability act, served upon the commissioner of corporations, is not a notice to a foreign corporation who is the employer, so as to create a right of action under the act.[1759]

This section applies only to foreign business corporations.[1760]

The provisions of this section are directory, to the extent that a failure to carry them out does not invalidate either express or implied contracts with the corporation, or deprive it of the right to sue in our courts.[1761] Therefore, it was held, while

137 Mass. 252; Lewis v. Northern Railroad, 139 Mass. 295, 1 N. E. Rep. 546; Young v. Providence, etc., Steamship Co., 150 Mass. 556, 23 N. E. Rep. 579; Reliance Mutual Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. Rep. 59; Doyle v. Continental Ins. Co., 94 U. S. 535; 1 Op. Atty.-Gen. 181; 1 Op. Atty.-Gen. 425.

Historical. Gen. St., c. 58, §§ 68, 69, applied only to insurance companies; Pub. St., c. 73, § 3, only to express companies; and Pub. St., c. 119, § 202, only to insurance companies. The first general act requiring foreign corporations to appoint an attorney was St. 1884, c. 330, in effect July 1, 1884, which did not apply to insurance companies. St. 1882, c. 106, applied to foreign mining, quarrying and oil companies.

[1757] Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 616; Bedford v. Eastern Building Association, 181 U. S. 241. See Sandel v. Atlanta L. Ins. Co., 53 S. Car. 241.

[1758] Healey v. George F. Blake Mfg. Co., 180 Mass. 270, 273, 62 N. E. Rep. 270, per Hammond, J.

[1759] Healey v. George F. Blake Mfg. Co., 180 Mass. 270, 62 N. E. Rep. 270.

[1760] Tulane University v. O'Connor, 192 Mass. 428.

[1761] Kelley v. Rice-Blake Lumber Co., 167 Mass. 28, 44 N. E. Rep. 1090; Rogers & Co. v. Simmons, 155 Mass. 259, 29 N. E. Rep. 580; Enterprise

the State insolvent law was in force, that a foreign corporation could make a voluntary petition in insolvency, before appointing the commissioner its attorney or filing the papers required by this section.[1762]

The act does not confer any new jurisdiction over the foreign corporation unless and until it appoints the commissioner its attorney, although in some other States it is held otherwise in the case of similar statutes.[1763]

b. Effect of appointment.

The effect of appointing an attorney is simply to bring the corporation before the court, when service has been made upon the commissioner of corporations, as if service had been obtained in the ordinary way. All other questions of jurisdiction are left open. The statute "does not assume, nor attempt to confer upon the court, nor require the foreign corporation to concede, any right to exercise authority over the organization, the corporate functions, the by-laws, nor the relations between the corporation and its members; nor to determine the rights and obligations of the corporation or its members, arising under the law of its creation, and depending on such local law. The requirements of the statute are fully answered, in respect to proceedings in the courts, when the corporation appears as defendant, and waives all questions as

Brewing Co. v. Grime, 173 Mass. 252, 255, 53 N. E. Rep. 855. Cf. Thwing v. Great Western Ins. Co., 111 Mass. 93, 109; Provincial Ins. Co. v. Lapsley, 15 Gray, 262; Lester v. Webb, 5 Allen, 573 (decided, however, under St. 1854, c. 453, § 36, validating certain contracts); Chase's Patent Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 28 N. E. Rep. 300 (statute forbidding domestic corporations to do business until certain formalities complied with). But see decisions as to foreign insurance companies under St. 1847, c. 273, § 3; Rev. St., c. 37, §§ 40 et seq., and St. 1887, c. 214, §§ 77 et seq., holding the provisions of those statutes mandatory upon a different wording. Jones v. Smith, 3 Gray, 500; Washington County Ins. Co. v. Dawes, 6 Gray, 376, 379; General Ins. Co. v. Phillips, 13 Gray, 90; Washington County Ins. Co. v. Chamberlain, 16 Gray, 165; Washington County Ins. Co. v. Hastings, 2 Allen, 398; Reliance Mutual Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. Rep. 59.

[1762] Kelley v. Rice-Blake Lumber Co., 167 Mass. 28, 44 N. E. Rep. 1090.

[1763] Rothrock v. Dwelling-House Ins. Co., 161 Mass. 423. Cf. Beale, For. Corp., § 267.

to due service of process. The foreign corporation will not thereby stand differently in court from any other party who has appeared to defend without objecting to the jurisdiction over the person of the defendant. He may still plead a want of jurisdiction on the ground that the subject-matter of the suit, or the remedy sought, is beyond the reach of the court, or not within the sovereign power of the State from which the court has its authority."[1764]

Although a foreign corporation having its principal place of business within the State had complied with the provisions of this section, it was held, while the insolvent law was in force, that it was not barred in collecting a debt by the discharge in insolvency of the debtor, even though it was engaged in the liquor business and had taken out a license.[1765]

Nor does the appointment of an attorney here prevent a foreign corporation from removing a cause into the federal courts,[1766] and a statute provision requiring foreign corporations to agree not to transfer cases to the federal courts is void; although the State may exclude a company which does so transfer cases, and the means and the motive of her action are not open to judicial inquiry.[1767] Nor is the appointment of an attorney a consent that the corporation may be sued in a federal district of the State by a plaintiff who is a resident of another federal district, where the only jurisdiction is founded solely on diversity of citizenship; but it may, in spite of such appointment, insist on the right to be sued only in the chartering district, or in that in which the plaintiff resides.[1768]

Nor, under a recent statute, does the appointment prevent

[1764] Smith v. Mutual Life Ins. Co., 14 Allen, 336, 341, per Wells, J. (decided under the statute requiring foreign insurance companies to appoint an attorney. R. L., c. 118, § 78; c. 124, § 6). Cf. Young v. Providence, etc., Steamship Co., 150 Mass. 550, 23 N. E. Rep. 579.

[1765] Bergner, etc., Brewing Co. v. Dreyfus, 172 Mass. 154, 51 N. E. Rep. 531 (note strong dissenting opinion of Field, C. J.); Smith v. Mutual, etc., Ins. Co. of New York, 14 Allen, 336, 342. See Guernsey v. Wood, 130 Mass. 503; Regina Flour Mill Co. v. Holmes, 156 Mass. 11.

[1766] Morton v. Mutual Ins. Co., 105 Mass. 141; Johnston v. Trade Ins. Co., 132 Mass. 433. Cf. Hobbs v. Manhattan Ins. Co., 56 Me. 417.

[1767] Doyle v. Continental Ins. Co., 94 U. S. 535.

[1768] Platt v. Massachusetts Real Est. Co., 103 Fed. 705.

service of process upon a foreign corporation in the same manner as upon a domestic corporation, if it has a principal or usual place of business within the commonwealth.[1769]

Under this section, so long as any liability remains outstanding against the corporation in this commonwealth, a service upon the commissioner of corporations is sufficient to enable the court to render a personal judgment against the company which would be held valid in other jurisdictions.[1770] "Even though a court of equity may in its discretion refuse to entertain a suit brought against . . . a foreign corporation to collect a debt, particularly when the plaintiff is a non-resident, it would not decline to take jurisdiction where the plaintiff is an inhabitant of the commonwealth, and the debt is the result of a contract which was made here and was to be performed here."[1771] And it will entertain a suit upon an ordinary contract though made in another State, and concerning property situated in another State, if there has been proper service upon the attorney here.[1772]

And it seems that, by a proceeding in equity, a citizen of this State may obtain payment of a debt out of the property in this State of a foreign corporation which has been dissolved.[1773]

But the court will not entertain a bill in equity brought by a foreign citizen against a foreign corporation to enforce rights dependent upon local foreign law, although the corporation has appointed an attorney here.[1774]

Under the General Statutes, it was decided that an insur-

[1769] St. 1907, c. 332, § 1, in effect April 24, 1907. See infra, § 62, b.

[1770] Wilson v. Martin-Wilson Fire Alarm Co., 149 Mass. 26, 20 N. E. Rep. 318; Lafayette Ins. Co. v. French, 18 How. 404; Ex parte Schollenberger, 96 U. S. 369; St. Clair v. Cox, 106 U. S. 350; National Bank of Commerce v. Huntington, 129 Mass. 444; Johnston v. Trade Ins. Co., 132 Mass. 432.

[1771] Wilson v. Martin-Wilson Fire Alarm Co., 149 Mass. 26, 20 N. E. Rep. 318; Pierce v. Equitable Assurance Society, 145 Mass. 56, 12 N. E. Rep. 858.

[1772] Johnston v. Trade Ins. Co., 132 Mass. 433.

[1773] Folger v. Columbian Ins. Co., 99 Mass. 267.

[1774] Smith v. Mutual, etc., Ins. Co., 14 Allen, 336; Kansas Construction Co. v. Topeka, etc., R. R. Co., 135 Mass. 40.

ance company, which had issued a policy to a citizen of this State without appointing an agent here, could, upon appointing the agent, collect an assessment by suit. The statute, however, expressly provided that no assessment should be recovered until the terms of the statute should have been complied with, in this regard differing from the present act.[1775]

c. Evidence of appointment.

The provision of the section, that copies of the power of attorney duly certified shall be sufficient evidence, is declaratory of the previous law.[1776] A certified copy of documents required to be filed by foreign corporations is competent evidence, with other facts, to show that certain premises within the State were under the control of a certain foreign corporation.[1777]

d. Withdrawal of attorney.

The statute provides that the authority of the attorney shall continue in force as long as any liability remains outstanding against the corporation in this Commonwealth. This express provision is in accord with decisions in other States, to the effect that a corporation cannot withdraw its attorney while liabilities incurred by it continue, although it has ceased to do business in the State, and the statute does not expressly continue the attorney.[1778]

Thus, while a single suit is pending against the corporation,

[1775] Gen. St., c. 58, § 72; Nat. Ins. Co. v. Pursell, 10 Allen, 232. Cf. Hartford Ins. Co. v. Matthews, 102 Mass. 221; Com. v. Goldstein, 114 Mass. 272; Leonard v. Washburn, 100 Mass. 252.

[1776] Commonwealth v. Corkery, 175 Mass. 460, 56 N. E. Rep. 711 (copy of charter).

[1777] Smith v. Paul Boyton Co., 176 Mass. 217, 57 N. E. Rep. 367.

[1778] Groel v. United Electric Co., 60 Atl. 822 (N. J.); Collier v. Mutual Reserve Fund Life Ass., 119 Fed. 617 (Ark.); Davis v. Kansas & Texas Coal Co., 129 Fed. 149 (Ark.). On the other hand it has been held that jurisdiction over the foreign corporation ceases when it no longer does business in the State, as where its license to do business has been revoked, Swarm v. Mutual Reserve Fund Life Ass., 100 Fed. 922 (Ky.), or where it has voluntarily withdrawn, Friedman v. Empire Life Ins. Co., 101 Fed. 535 (Ky.). See Mutual Reserve Fund Life Ass. v. Phelps, 190 U. S. 147.

although it may have given a bond to dissolve an attachment, it is under a liability, and its power of attorney is still in force.

e. Enforcement of this section.

It is provided by statute that "upon an information in equity in the name of the attorney-general, at the relation of the commissioner of corporations, the Supreme Judicial Court shall have power to restrain by injunction . . . any foreign corporation from assuming or exercising any corporate rights, privileges or franchises in this commonwealth until the provisions of sections fifty-eight and sixty of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three and of all acts in amendment thereof have been complied with." [1779]

§ 59. Notice of process.

"When legal process against any such corporation has been served upon the commissioner, he shall immediately give notice to the corporation of such service by mail, postage prepaid, directed, in the case of a corporation established in a foreign country, to the resident manager, if any, in the United States; and shall, within two days after such service, in the same manner forward a copy of the process served upon him to such corporation or manager, or to any other person designated by the corporation by written notice filed in the office of the commissioner. The fee of two dollars paid by the plaintiff to the commissioner at the time of the service shall be taxed in his costs, if he prevails in the suit. The commissioner shall keep a record of the day and hour of the service of all such processes." [1780]

The action of the commissioner of corporations, in forwarding to a foreign corporation a copy of a notice intended to charge the corporation under the employers' liability act, has no effect, as he is acting only as a public officer, and not as the agent of either the workmen or the corporation; and the statute requiring powers of attorney from foreign corpora-

[1779] St. 1906, c. 372, in effect May 8, 1906.

[1780] St. 1903, c. 437, § 59; R. L., c. 126, § 5; St. 1884, c. 330, §§ 2, 4.

Citations. — St. 1884, c. 330, §§ 2, 4: Healey v. Geo. F. Blake Mfg. Co., 180 Mass. 274, 62 N. E. Rep. 270; Kelley v. Rice-Blake Lumber Co., 167 Mass. 29, 44 N. E. Rep. 1090; Tulane University v. O'Connor, 192 Mass. 433.

This provision is the same as in the Revised Laws.

tions does not make such a notice a proper one to hold an employer, being intended merely to aid in the enforcement of rights of action already existing, and not to aid in the creation of new rights.[1781]

§ 60. Copy of charter, by-laws and certificate to be filed.[1782]

"Every foreign corporation, of the classes described in section fifty-eight, before transacting business in this commonwealth, shall upon payment of the fee hereinafter provided, file with the commissioner of corporations a copy of its charter, articles or certificate of incorporation, certified under the seal of the state or country in which such corporation is incorporated by the secretary of state thereof or by the officer having charge of the original record therein, a true copy of its by-laws, and a certificate in such form as the commissioner of corporations may require, setting forth (a) the name of the corporation; (b) the location of its principal office; (c) the names and the addresses of its president, treasurer, clerk or secretary and of the members of its board of directors; (d) the date of its annual meeting for the election of officers; (e) the amount of its capital stock, authorized and issued, the number and par value of its shares, the amount paid in thereon to its treasurer, and, if any part of such payment has been made otherwise than in money, of the details of such payment, so far as practicable, in accordance with the provisions of section eleven. Said certificate shall be subscribed and sworn to by its president, treasurer and by a majority of its directors or officers having the powers usually exercised by directors. The officers and directors of such corporation shall be subject to the same penalties and liabilities for false and fraudulent statements and returns as officers and directors of a domestic corporation subject to this act. Every officer of such a corporation which fails to comply with the requirements of this section and of sections fifty-eight and sixty-six, and every agent thereof who transacts business as such in this commonwealth shall, for such failure, be liable to a fine of not more than five hundred dollars. Such failure shall not affect the validity of any contract with such corporation,

[1781] Healey v. George F. Blake Manuf. Co., 180 Mass. 270, 62 N. E. Rep. 270.

[1782] As to certificates of increase or decrease of capital, see infra, § 65.

but no action shall be maintained or recovery had in any of the courts of this commonwealth by any such foreign corporation so long as it fails to comply with the requirements of said sections." [1783]

a. Construction of statute — Right to sue.

These provisions, like others in this chapter, are directory merely; and a failure to comply with them does not invalidate the contracts of the corporation, nor under the former law did it deprive it of its right to sue in the courts.[1784] The present act expressly suspends the right of the corporation to sue until this section is complied with, but after a compliance it seems that it may maintain an action on a contract made previously.[1785]

Compliance with the statute need not be averred or proved by a plaintiff corporation; but non-compliance must be set up by the defendant, and is not covered by a general denial.[1786]

Corporations engaged solely in interstate commerce are not within the provisions of this section,[1787] and it applies only to business corporations.[1788]

[1783] St. 1903, c. 437, § 60; R. L., c. 126, § 6; St. 1900, c. 280; St. 1895, c. 157; St. 1884, c. 330, §§ 3, 4.

Citations. — St. 1903, c. 437, § 60: Friedenwald Co. v. Warren, 81 N. E. Rep. 207 (Mass. 1907).

St. 1895, c. 157: Edwards v. Warren Linoline, etc., Works, 168 Mass. 569, 47 N. E. Rep. 502; Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 156, 51 N. E. Rep. 531.

St. 1884, c. 330, §§ 3, 4: Com. v. Corkery, 175 Mass. 461, 56 N. E. Rep. 711; Kelley v. Rice-Blake Lumber Co., 167 Mass. 29, 44 N. E. Rep. 1090; Hunnewell v. Duxbury, 154 Mass. 286; s. c., 157 Mass. 1; Steel v. Webster, 188 Mass. 480.

See also, generally, Hunnewell v. Duxbury, 154 Mass. 286, 28 N. E. Rep. 267; Rogers & Co. v. Simmons, 155 Mass. 259, 29 N. E. Rep. 580.

[1784] Rogers & Co. v. Simmons, 155 Mass. 259, 29 N. E. Rep. 580. As to contracts, see also Leonard v. Washburn, 100 Mass. 251, holding that one who had paid an insurance premium could not recover it.

[1785] Nat. Mutual Fire Ins. Co. v. Pursell, 10 Allen, 231 (decided under the similar provisions of Gen. St., c. 58, § 68, as to foreign insurance companies).

[1786] Friedenwald Co. v. Warren, 81 N. E. Rep. 207 (Mass. 1907).

[1787] See supra, § 56, *c*.

[1788] Tulane University v. O'Connor, 192 Mass. 428.

b. Changes in by-laws.

Whenever any change is made in the by-laws altering the date fixed thereby for the annual meeting of a corporation, the latter must file in the office of the commissioner of corporations a certificate of such change signed and sworn to by the clerk of the corporation.[1789]

It would seem proper to file also copies of any changes in the other by-laws, although in practice the commissioner does not require it, and the act merely requires them to be included in the annual certificate of condition.[1790]

c. False statements.

False statements in a certificate filed under this section cannot be made the basis of an action of deceit against the officers of the corporation. "The certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the State a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents and be induced by them to take the notes. It is not such a representation, made by one to another with intent to deceive, as will sustain the action. Its statements are in no fair sense addressed to the person who searches for, discovers and acts upon them, and cannot fairly be inferred or found to have been made with the intent to deceive him."[1791] It would seem that this decision might well have been the other way, as the only conceivable purpose of requiring the copies to be filed, aside from ascertaining that the purposes for which the corporation was organized, or some of them, were such as to entitle it to do business in this State, is for the

[1789] St. 1905, c. 222. See supra, § 13, *f*.

[1790] See infra, § 66.

[1791] Hunnewell v. Duxbury, 154 Mass. 286, 290, 28 N. E. Rep. 267, per Barker, J.

information of the general public, who cannot conveniently have access to documents filed in the home State.[1792]

Mere oral representations of officers of the corporation in reference to the financial standing or means, if made to induce the plaintiff to give credit to the corporation, are made with reference to the credit and ability of another person within the Statute of Frauds, and no action can be maintained thereon.[1793] Query, however, whether, if an officer refers an enquirer to a certificate filed at the State House as showing the financial standing of the corporation, such reference would be within the statute.[1794]

d. — Liability of officers and directors.

It will be noted that this section imposes the same penalties and liabilities upon officers and directors for "false and fraudulent statements and returns" as on those of domestic corporations. This refers to section 34, providing that "the president, treasurer and directors of every corporation shall be jointly and severally liable for all the debts and contracts of the corporation contracted or entered into while they are officers thereof . . . if any statement or report which is required by the provisions of this act is made by them which is false in any material representation and which they know to be false; but only the officers who sign such statement or report shall be so liable." This covers the annual tax return of a domestic corporation required by section 48.

Section 70 of the act repeats the language of section 34 and applies it to the "officers" of foreign corporations, thus covering the annual certificate of condition required by section 66.

It would seem that this clause in section 60 was unnecessary in view of section 70.

[1792] Cf. the reasoning of the court as to annual certificates of condition in Heard v. Pictorial Press, 182 Mass. 530, cited infra, § 66.

[1793] Hunnewell v. Duxbury, 157 Mass. 1. Cf. R. L., c. 74, § 4; Walker v. Russell, 186 Mass. 69, 72. See also supra, chap. IV, C.

[1794] Hunnewell v. Duxbury, 157 Mass. 1, 6.

e. Copies as evidence.

Copies of the charter, etc., deposited with the commissioner are competent evidence,[1795] although not expressly made so as in the case of the power of attorney;[1796] and, with other evidence, are competent evidence that certain premises within the State were under the control of a certain foreign corporation.[1797]

f. Enforcement of this section.

It is provided by statute that "upon an information in equity in the name of the attorney-general, at the relation of the commissioner of corporations, the Supreme Judicial Court shall have power to restrain by injunction . . . any foreign corporation from assuming or exercising any corporate rights, privileges or franchises in this commonwealth until the provisions of sections fifty-eight and sixty of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three and of all acts in amendment thereof have been complied with."[1798]

§ 61. Investigation as to the kind of business to be done

"The commissioner of corporations shall refuse to accept or file the charter, certificate or other papers of, or accept appointment as attorney for service for, any such corporation which does a business in this commonwealth the transaction of which by domestic corporations is not then permitted by the laws of this commonwealth."[1799]

As to what kinds of business are lawful, see supra, § 57.

"It is doubtful if the commissioner of corporations has the right to look beyond the words of the charter to ascertain the character of the corporation."[1800]

[1795] Com. v. Corkery, 175 Mass. 460, 56 N. E. Rep. 711.

[1796] See supra, § 58.

[1797] Smith v. Paul Boyton Co., 176 Mass. 217, 57 N. E. Rep. 367.

[1798] St. 1906, c. 372, in effect May 8, 1906.

[1799] St. 1903, c. 437, § 61; R. L., c. 126, § 7; St. 1894, c. 381.

Citations. — St. 1894, c. 381: Enterprise Brewing Co. v. Grime, 173 Mass. 256, 53 N. E. Rep. 855.

See also, generally, 1 Op. Atty.-Gen. 181; 1 Op. Atty.-Gen. 339.

[1800] 1 Op. Atty.-Gen. 583, 584.

§ 62. Foreign corporations may be sued and their property attached.

"Foreign corporations which have property in this commonwealth shall be liable to be sued and to have their property attached in the same manner and to the same extent as natural persons who are residents of other states and who have property in this commonwealth. The service of the writ shall be made in the manner provided in chapters one hundred and sixty-seven and one hundred and seventy of the Revised Laws, with such further service as the court to which the writ is returnable may order." [1801]

a. Jurisdiction is statutory.

"A corporation, being a mere creature of local statutes, can, of right, have no existence nor recognition beyond the limits of the State wherein it is established. By comity, such artificial persons are permitted to contract and to sue[1802] in other States. If they avail themselves of that comity, to sue or to make contracts in another State, they may become liable to its jurisdiction to the extent to which they have thus voluntarily subjected themselves. If they have property or rights within the limits of another State, suits can be maintained and judgments enforced against them to the extent of such property and rights; but this results from the authority of the State over whatever is within its limits, and not from any

[1801] St. 1903, c. 437, § 62; R. L., c. 126, § 9; Pub. St., c. 105, § 28; Gen. St., c. 68, § 15; St. 1839, c. 158.

Citations. — Pub. St., c. 105, § 28: Young v. Providence, etc., Steamship Co., 150 Mass. 555, 23 N. E. Rep. 579.

Gen. St., c. 68, § 15: Folger v. Columbian Ins. Co., 99 Mass. 272; Nat. Bank of Commerce v. Huntington, 129 Mass. 446.

St. 1839, c. 158: Ocean Ins. Co. v. Portsmouth Ry. Co., 3 Met. 420; Danforth v. Penny, 3 Met. 565; Thayer v. Tyler, 10 Gray, 164; Nat. Bank of Commerce v. Huntington, 129 Mass. 446.

See also, generally, Portsmouth Livery Co. v. Watson, 10 Mass. 91; Peckham v. North Parish in Haverhill, 16 Pick. 274; British American Land Co. v. Ames, 6 Met. 391; American, etc., Insurance Co. v. Owen, 15 Gray, 491.

[1802] Portsmouth Livery Co. v. Watson, 10 Mass. 91; British American Land Co. v. Ames, 6 Met. 391; American Mut. Life Ins. Co. v. Owen, 15 Gray, 491. Cf., as to trustee process, Ocean Ins. Co. v. Portsmouth Ry. Co., 3 Met. 420, and generally, Johnston v. Trade Ins. Co., 132 Mass. 432.

jurisdiction over the corporation itself. The judgment is operative only to the extent of such property and rights. As to these it is analogous in its effects to a proceeding in rem." [1803]

Even provisions like those for the appointment of an attorney "cannot transfer to the tribunals of this State any power which would not be acquired by the mere fact of actual service, or waiver of service, upon the defendant. It cannot obliterate the fact nor change the consequences that result from the fact, of the non-resident character of the defendant. Such service upon a citizen of another State, casually or temporarily within reach of process, does not ordinarily subject all his relations, rights and obligations to the cognizance of the courts of the State in which he happens to be found; but only such as have arisen therein, and such as are in their nature personal or transitory. . . . In suits upon contracts made and causes of action arising elsewhere, the courts thus do, indeed, to some extent, administer the laws of other States. But in such cases the proceedings are only incidentally affected by them; they do not depend upon such foreign laws. The rights and liabilities of parties under local laws do not always follow them into other jurisdictions." [1804]

At common law, therefore, before St. 1839, a foreign corporation could not be sued in this State at all; [1805] and any jurisdiction over a foreign corporation like that over a non-resident natural person must be wholly derived from statute. [1806]

[1803] Smith v. Mutual, etc., Ins. Co. of New York, 14 Allen, 336, 339, per Wells, J., citing Bissell v. Briggs, 9 Mass. 462; Blackstone Mfg. Co. v. Blackstone, 13 Gray, 488; Gillespie v. Commercial Ins. Co., 12 Gray, 201. See also Folger v. Columbian Ins. Co., 99 Mass. 267, 272; Bank of Augusta v. Earle, 13 Pet. 519; Kennebec Co. v. Augusta, etc., Co., 6 Gray, 208; American Ins. Co. v. Owen, 15 Gray, 491; Ocean Ins. Co. v. Portsmouth Marine Railway Co., 3 Met. 420; Pierce v. Equitable Life Assurance Society, 145 Mass. 46, 52.

[1804] Smith v. Mutual, etc., Ins. Co. of N. Y., 14 Allen, 336. Cf. Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 154, 158, 51 N. E. Rep. 531; Re Hohorst, 150 U. S. 653; Bishop v. Globe Co., 135 Mass. 132.

[1805] Peckham v. Haverhill Parish, 16 Pick. 274 (1834).

[1806] Young v. Providence, etc., Steamship Co., 150 Mass. 550, 555. See Beale, For. Corp., chap. IV; 19 Harv. L. Rev. 52.

On the other hand, jurisdiction once obtained, the rights and obligations of the stockholders, as between themselves and the corporation,[1807] and the rights of creditors as against the assets of the corporation,[1808] are generally determined by the laws of the chartering State, subject to the limitation that the rights of residents shall be proteced. Thus if a claim is barred by the statute of limitations here, a creditor cannot escape the bar by obtaining a judgment in a foreign State, and then suing on the judgment here.[1809]

A foreign corporation, after appearing and answering to the merits, cannot then for the first time object to the jurisdiction.[1810]

b. Actions at law.

This section provides that if a foreign corporation has property here it may be sued, and its property may be attached, as in the case of other non-residents who own property within this State.

The Revised Laws provide that "**a personal action shall not be maintained against a person who is not an inhabitant of this commonwealth, unless he has been served with process within this commonwealth, or unless an effectual attachment of his property within this commonwealth has been made upon the original writ, and, in case of such attachment without such service, the judgment shall be valid to secure the application of the property so attached to the satisfaction of the judgment, and not otherwise.**" [1811]

[1807] Bishop v. Globe Co., 135 Mass. 132; Hutchins v. New England Coal Mining Co., 4 Allen, 580; Halsey v. McLean, 12 Allen, 438; Electric Welding Co. v. Prince, 81 N. E. Rep. 306 (Mass. 1907); Anglo-American Land, etc., Co. v. Dyer, 181 Mass. 593. Cf. infra, *j–o*.

[1808] Union Cattle Co. v. International Trust Co., 149 Mass. 492, 499.

[1809] Stebbins v. Scott, 172 Mass. 356.

[1810] Pierce v. Equitable Life Assurance Co., 145 Mass. 56.

[1811] R. L., c. 170, § 1; Pub. St., c. 164, § 1; Gen. St., c. 126, § 1; Rev. St., c. 90, § 44. See Rothschild v. Knight, 176 Mass. 48, 57 N. E. Rep. 337; Kimball v. Sweet, 170 Mass. 538, 51 N. E. Rep. 116; Young v. Providence, etc., Steamship Co., 150 Mass. 555, 23 N. E. Rep. 579; Eliot v. McCormick, 144 Mass. 10, 10 N. E. Rep. 705; Graves v. Cushman, 131 Mass. 359; Peabody v. Hamilton, 106 Mass. 220; Richardson v. Smith, 11 Allen, 134; Bodurtha v. Goodrich, 3 Gray, 508; Orcutt v. Ranney, 10 Cush. 183; Spurr v. Scoville, 3 Cush. 578. Cf. Andrews v. Michigan Central R. R., 99 Mass. 534; Silloway v. Columbia Ins. Co., 8 Gray, 199.

A recent statute also provides that —

"In an action against a foreign corporation having its principal or a usual place of business within this commonwealth service of the summons or writ may be made according to the provisions of section thirty-six of chapter one hundred and sixty-seven of the Revised Laws for service in actions against domestic corporations; and such service shall be of the same effect and validity as if made upon the commissioner of corporations." [1812]

R. L., c. 167, § 36, above referred to, is as follows:

"In an action against a corporation . . . the summons shall be served by leaving the original or copy, as the case may be, with the clerk, cashier, secretary, agent or any other officer who has charge of its business; and if no such officer is found within the county, the summons may be served on any member of the corporation." [1813]

The effect of all these provisions is, that an action will not lie against a foreign corporation, unless (1) its property has been attached; or (2) it has appointed the commissioner of corporations its attorney and service is made upon him, under section 58; or (3) service is made on some officer or agent, if the corporation has a principal or usual place of business here.[1814]

[1812] St. 1907, c. 332, § 1, in effect April 24, 1907.

[1813] For notes on this statute, see supra, § 4, *g*.

[1814] Prior to St. 1907, c. 332, no action would lie against a corporation, unless the property of the corporation had been attached or it had appointed the commissioner its attorney. National Bank v. Huntington, 129 Mass. 444; Desper v. Continental Water Meter Co., 137 Mass. 252, 253. Contra, Newby v. Colt's Patent Fire Arms Co., L. R., 7 Q. B. 293; Baltimore, etc., R. Co. v. Wightman, 29 Grat. 431. See Williams v. Empire Transportation Co., 14 Pat. Off. Gaz. 523; Wilson Packing Co. v. Hunter, 8 Biss. 429; Andrews v. Michigan Central R. Co., 99 Mass. 534; Silloway v. Columbia Ins. Co., 8 Gray, 199; Peckham v. Haverhill Parish, 16 Pick. 274, 286. For a service on the commissioner of corporations prior to his appointment as attorney is of no effect (Rothrock v. Dwelling-House Ins. Co., 161 Mass. 423; cf. Beale, For. Corp., § 267); and it had been expressly decided that a service on an officer of a foreign corporation at its office within the Commonwealth was not sufficient to give jurisdiction. Andrews v. Michigan Central R. Co., 99 Mass. 534; Desper v. Continental Water Meter Co., 137 Mass. 252; Lewis v. Northern Railroad, 139 Mass. 294; Boston Electric Co. v. Electric Gas Lighting Co., 23 Fed. Rep. 838 (C. C., Mass.). Contra, Hayden v. Androscoggin Mills, 1 Fed. Rep. 93 (C. C., Mass.). Cf. Peckham v. Haverhill Parish, 16 Pick. 274, 286; Thayer v. Tyler, 10 Gray, 164, 169.

Even if the property of the corporation has been attached, unless service is had upon the commissioner of corporations after his appointment as attorney, or upon an officer, agent, etc., of the corporation, there must be further notice to the corporation in such manner as the court shall order;[1815] and, indeed, such is the wording of the act.

The facts that a corporation has no usual place of business in the State, that no property was attached on the writ, and that the person on whom service of the writ was made was not authorized to receive service for it, can be pleaded in abatement.[1816]

Where the court does take jurisdiction, it will happen in many cases that the questions involved are to be decided by the law of the chartering State. Such a question, for example, is the liability of a subscriber to buy calls.[1817]

c. — Trustee process.

It is provided by statute, as to trustee process, that "a person who is not an inhabitant of the commonwealth, or a corporation which is not established under its laws, shall not be so summoned unless he or it has a usual place of business in the commonwealth."[1818]

By strict analogy with the case of non-resident natural persons, it would seem that the action should have lain if the corporation had been served with process within the commonwealth, and that it might well have been considered to be found here, if it had a usual place of business here.

This question was not considered in the case of Andrews v. Michigan Central R. Co., 99 Mass. 534. See Nat. Bank of Commerce v. Huntington, 129 Mass. 444, 446. If it were answered in the affirmative it would make simple actions like trustee process, where the foreign corporation may be served if it has a usual place of business here. See infra, *b*, and Beale, For. Corp., §§ 74, *ff*.

In general, the residence of an officer within the state is not enough to cause the corporation to be found therein. Conley v. Mathieson Alkali Works, 190 U. S. 406; Goldey v. Morning News, 156 U. S. 518; Peckham v. North Parish, 16 Pick. 274, 286. See McQueen v. Middletown Mfg. Co., 16 Johns. (N. Y.) 5; Middleboro v. Springfield Fire Ins. Co., 14 Conn. 301.

[1815] Lewis v. Northern Railroad, 139 Mass. 294; Thayer v. Tyler, 10 Gray, 194. See R. L., c. 167, § 34 and c. 170.

[1816] Young v. Providence, etc., Steamship Co., 150 Mass. 550, 23 N. E. Rep. 579. Cf. Smith v. Mutual Life Ins. Co., 14 Allen, 336.

[1817] Electric Welding Co. v. Prince, 81 N. E. Rep. 306 (Mass. 1907); Anglo-American Land, etc., Co. v. Dyer, 181 Mass. 593. See supra, under *a*, and infra, under *j–o*.

[1818] R. L., c. 189, § 1; Pub. St., c. 183, § 1; St. 1870, c. 194. National Bank v. Huntington, 129 Mass. 446.

Subject to this limitation, a foreign corporation may be summoned as trustee; and it has been held that a corporation having an office in this State, where its principal officers were to be found and much of its business transacted, had a usual place of business in this State, and could be summoned by process served on the treasurer.[1819]

It is provided by statute, as to trustee process, that "in an action by trustee process in which a foreign corporation having a usual place of business within this commonwealth is designated as trustee, service of the writ upon the treasurer or other officer of such corporation shall be of the same effect and validity as if made upon the commissioner of corporations." [1820]

A foreign corporation may also have its property attached as defendant in a trustee writ in which another is summoned as trustee; for the word "property" in section 62 of the present act includes effects and credits as well as goods and estate.[1821] And a judgment for the plaintiff in such an action will protect the trustee against an action by the foreign corporation.[1822]

d. Suits in equity — Equitable attachment.

The general principles as to jurisdiction which have been already considered [1823] apply to suits in equity as well as to actions at law.

The statutory provisions enabling "creditors to reach and

Historical. Prior to St. 1870, c. 194, a foreign corporation could not be charged in trustee process, even though many of its officers and stockholders resided within the State, and its books and papers and some of its property were here. Danforth v. Penny, 3 Met. 564; Larkin v. Wilson, 106 Mass. 120; Gold v. Housatonic R. Co., 1 Gray, 424. Cf. Smith v. Mutual Life Ins. Co., 14 Allen, 336, 342; Ray v. Underwood, 3 Pick. 302.

[1819] National Bank v. Huntington, 129 Mass. 446.

[1820] St. 1906, c. 269.

[1821] Ocean Ins. Co. v. Portsmouth R. Co., 3 Met. 420; Folger v. Columbian Ins. Co., 99 Mass. 267, 272; National Bank v. Huntington, 129 Mass. 444, 450.

[1822] Ocean Ins. Co. v. Portsmouth R. Co., 3 Met. 420, 424; National Bank v. Huntington, 129 Mass. 444, 450.

See also Wallace v. McConnell, 13 Pet. 136; Rothschild v. Knight, 176 Mass. 48, 53.

[1823] Supra, *a*.

apply, in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, within or without this Commonwealth, which cannot be reached to be attached or taken on execution in an action at law,"[1824] apply to foreign corporations;[1825] and it seems such a bill may be maintained even when the corporation has been dissolved in the foreign jurisdiction.[1826]

Letters patent belonging to a foreign corporation, being property which cannot be attached or taken on execution, may therefore be reached in equity by a creditor who is an inhabitant of this State, whose debt is the result of a contract made here to be performed here, provided the corporation has been duly served with process.[1827] But if there has been no service, in accordance with the principles discussed above, a bill in equity will not lie.[1828]

A creditor of a foreign corporation who has joined in a creditors' bill in the chartering State, in which suit a receiver has been appointed, will not be allowed to sue in equitable attachment here, as the title of the receiver is good by comity.[1829]

e. — Other cases of equity jurisdiction.

A bill in equity will lie to compel specific performance of a contract, where proper service has been made,[1830] and the court can enforce the performance; or to require the estate of a former officer to make good to the corporation, which is also

[1824] R. L., c. 159, § 3, cl. 7; St. 1902, c. 544, § 23.

[1825] Silloway v. Columbia Ins. Co., 8 Gray, 199, 203; Folger v. Columbian Ins. Co., 99 Mass. 267, 277.

[1826] Folger v. Columbian Ins. Co., 99 Mass. 267.

[1827] Wilson v. Martin-Wilson Fire Alarm Co., 149 Mass. 24; s. c., 151 Mass. 515; Ager v. Murray, 105 U. S. 126.

[1828] Desper v. Continental Water Meter Co., 137 Mass. 252 (bill for specific performance of contract to convey letters patent).

[1829] Gerding v. East Tennessee Land Co., 185 Mass. 380.

[1830] Desper v. Continental Water Meter Co., 137 Mass. 252 (in this case the bill was dismissed for lack of service). Cf. Kansas Construction Co. v. Topeka, etc., R. Co., 135 Mass. 34 (where the court refused to take jurisdiction, the performance of the plaintiff being to be made in another State).

made a defendant, the amount of his frauds and misappropriations while in office;[1831] or to restrain the corporation from doing an unauthorized business.[1832]

In the last two of these cases it is not necessary or proper to appoint a receiver as ancillary to an injunction against the unlawful business or to an order for an accounting.[1833] But, in a proper case, the court will appoint an ancillary receiver, and will be likely to do so where all the assets of the corporation are in the Commonwealth.[1834]

Equity will also take jurisdiction of a suit against a corporation brought before the expiration of its charter, where the statutes of the chartering State provide for the continuation of any suit by receivers or trustees appointed to hold its property.[1835]

f. — Cases where equity will not take jurisdiction.

"The rule is well established in this Commonwealth that ordinarily our courts will decline jurisdiction in matters which pertain to the interior life and conduct of a corporation as a creature of a foreign State, and which particularly involve a knowledge and application of the statutes of that State, and which often require for their proper adjustment full jurisdiction of the corporation and of its members for different purposes."[1836]

[1831] Wineburgh v. United States Steam, etc., Co., 173 Mass. 60; Richardson v. Clinton Wall Trunk Co., 181 Mass. 580. Cf. Ervin v. Oregon Railway, etc., Co., 20 Fed. 577.

[1832] Richardson v. Clinton Wall Trunk Co., 181 Mass. 580.

[1833] Richardson v. Clinton Wall Trunk Co., 181 Mass. 580.

[1834] Garham v. Mutual Aid Society, 161 Mass. 357, 365; Wineburgh v. United States Steam, etc., Co., 173 Mass. 60, 62.

[1835] Michigan State Bank v. Gardner, 15 Gray, 362, 373.

[1836] Richardson v. Clinton Wall Trunk Co., 181 Mass. 580, 582, per Knowlton, J., citing Kimball v. St. Louis, etc., Railway, 157 Mass. 7; Wason v. Buzzell, 181 Mass. 338; North State, etc., Mining Co. v. Field, 64 Md. 151. See also Smith v. Mutual Life Ins. Co., 14 Allen, 336; Kansas Construction Co. v. Topeka, etc., R. Co., 135 Mass. 34; Pierce v. Equitable Life Assurance Society, 145 Mass. 56, 63; New Haven Horse Nail Co. v. Linden Spring Co., 142 Mass. 349; Williston v. Michigan Southern, etc., R. Co., 13 Allen, 400.

Cf. Bishop v. Globe Co., 135 Mass. 132; Hutchins v. New England Coal Mining Co., 4 Allen, 580; Halsey v. McLean, 12 Allen, 438.

Therefore our courts will not take jurisdiction of a bill by stockholders of a foreign corporation to enjoin the issuing of bonds unless the latter are subordinated to their stock,[1837] or to compel the declaring and payment of dividends.[1838]

Nor will they undertake to determine the validity of the election of officers, that being a matter relating to the internal affairs of the corporation;[1839] nor will they appoint a receiver when it would amount in effect to a dissolution of the corporation.[1840]

Nor will they undertake to determine whether a person is or is not a shareholder in the foreign corporation.[1841]

g. Cross actions.

It is provided by statute that "if an action is brought by a person who is not an inhabitant of this commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other. If there are several defendants in the original action, each of them may bring such cross action against the original plaintiff and may be allowed to set off his judgment against that which may be recovered against himself and his co-defendants in like manner as if the latter judgment had been against himself alone." [1842]

"The writ in such cross action may be served on the person who appears as the attorney of the plaintiff in the original action, and such service shall be as valid and effectual as if made on the party himself in this commonwealth." [1843]

These provisions are constitutional and apply to foreign corporations.[1844] In such a case, the cross action may be for

[1837] Kimball v. St. Louis, etc., R. Co., 157 Mass. 7.

[1838] Williston v. Michigan Southern, etc., R. Co., 13 Allen, 400, 406.

[1839] Wason v. Buzzell, 181 Mass. 338.

[1840] Richardson v. Clinton Wall Trunk Co., 181 Mass. 580, 583.

[1841] Electric Welding Co. v. Prince, 81 N. E. 306; Smith v. Mutual Ins. Co., 14 Allen, 336; Kimball v. St. Louis, etc., R. Co., 157 Mass. 7; National Telephone Mfg. Co. v. Du Bois, 165 Mass. 117; Wason v. Buzzell, 181 Mass. 338.

[1842] R. L., c. 170, § 2; Pub. St., c. 164, §§ 2, 3; Gen. St., c. 126, §§ 2, 3; Rev. St., c. 90, §§ 49, 50; St. 1823, c. 118.

[1843] R. L., c. 170, § 3; Pub. St., c. 164, § 4; Gen. St., c. 126, § 4; Rev. St., c. 90, § 51.

[1844] Aldrich v. Blatchford, 175 Mass. 369.

unliquidated damages; and a settlement of the original action does not affect the jurisdiction of a cross action brought before the settlement.[1845] But the cross action can only be between the parties to the original action.[1846]

Where there is only one defendant in an action by a foreign corporation, he may set off his judgment as a matter of absolute right;[1847] but, where there are several defendants in the original action who bring one or more cross actions, the right of set-off is in the discretion of the court.[1848]

h. Removal of actions to federal courts.

The fact that a foreign corporation has appointed an attorney here in accordance with the requirement of statute does not prevent it from removing an action to which it is a party into the federal courts.[1849]

i. Actions in federal courts.

The circuit courts of the United States have jurisdiction of civil suits, at law or in equity, where the matter in dispute, exclusive of interest and costs, exceeds two thousand dollars, in which there is a controversy between citizens of different States. Suit can be brought only in the district of which the defendant is an inhabitant, and, where the jurisdiction is founded solely on diversity of citizenship, suit can be brought only in the district of the residence of either the plaintiff or the defendant.[1850]

The word "citizen" as used in the judiciary acts has always been held to include corporations;[1851] and it has also been held

[1845] Aldrich v. Blatchford, 175 Mass. 369.

[1846] Kimball v. Sweet, 170 Mass. 538.

[1847] Franks v. Edinberg, 185 Mass. 49, 53.

[1848] Franks v. Edinberg, 185 Mass. 49, 53.

[1849] Morton v. Mutual Ins. Co., 105 Mass. 141, 147; Johnston v. Trade Ins. Co., 132 Mass. 432, 434. To the same effect, Hobbs v. Manhattan Ins. Co., 56 Me. 417.

[1850] Act of March 3, 1875, c. 137, § 1, 18 Stat. 470; Act of March 3, 1887, c. 373, § 1; Act of Aug. 13, 1888, c. 866, § 1.

[1851] Barrow Steamship Co. v. Kane, 170 U. S. 100.

that a foreign corporation can inhabit only the chartering State, the word "habitancy" being equivalent to "domicile."[1852]

The result of these statutes and decisions is that suits against a foreign corporation must be brought in the chartering State and in the district in which the corporation resides and of which it is an inhabitant; unless the jurisdiction is founded solely on diversity of citizenship, and in that case suit may be brought either in the State of which the plaintiff is a citizen and in the district in which he resides and of which he is an inhabitant, or in the chartering State of the corporation and the district in which it resides and of which it is an inhabitant.[1853]

The mere fact that a corporation has a usual place of business in another State does amount to a waiver of its right to be sued only in the chartering State,[1854] nor can it be regarded as an inhabitant of two or more districts in the same State, although it has a place of business in each district.[1855] It is an inhabitant of the district in which its chief office is located.[1856] Nor does the appointment of the commissioner of corporations as its attorney amount to an agreement that the corporation may be sued in the district in which the attorney is appointed, by a resident of another district, where the suit is founded upon diversity of citizenship.[1857]

But when once the jurisdiction is established, as in a suit by a resident of Massachusetts against a foreign corporation, it is held that the appointment of an attorney, not in terms restricted to the process of a State court, will be considered to apply to process from a federal court.[1858] The form of attor-

[1852] Shaw v. Quincy Mining Co., 145 U. S. 444; Southern Pacific Co. v. Denton, 146 U. S. 202; Re Keasbey, etc., Co., 160 U. S. 221; Platt v. Massachusetts Real Estate Co., 103 Fed. 705.

[1853] Southern Pacific Co. v. Denton, 146 U. S. 202; Re Keasbey, etc., Co., 160 U. S. 221.

[1854] Shaw v. Quincy Mining Co., 145 U. S. 444; Re Keasbey, etc., Co., 160 U. S. 221.

[1855] Galveston, etc., R. Co. v. Gonzales, 151 U. S. 496.

[1856] Lyman, etc., Co. v. Southard, 12 Blatchf. 405.

[1857] Platt v. Massachusetts Real Est. Co., 103 Fed. 705.

[1858] Ex parte Schollenberger, 96 U. S. 369.

ney used in this Commonwealth appoints the commissioner as attorney "upon whom all lawful processes in any action or proceeding against said corporation in said Commonwealth may be served, in like manner and with the same effect as if the corporation existed therein." As in this case the Commonwealth is the district, it would seem that this language was within the general rule above stated, and that process from a federal court could be served upon the commissioner.[1859]

j. Liability of resident stockholders in foreign corporations.[1860]

General principles.

The extent to which stockholders residing in Massachusetts holding shares in foreign corporations are liable for debts under statutes of the chartering States, and how far such liability will be enforced by the Massachusetts courts, have been discussed in several cases.[1861]

Thus, in a recent case, the court said:

"The principal question in the case is, whether such a liability can be enforced against stockholders in this Commonwealth. It is a familiar law that statutes do not extend *ex proprio vigore* beyond the boundaries of the State in which they are enacted. If they are merely penal, they cannot be enforced in another State. If they furnish merely a local remedy for the invasion of a recognized right which is protected elsewhere in other ways, they cannot be given effect in another jurisdiction.[1862] The fundamental question is whether there is a substantive right originating in one State and a corresponding liability which follows the person against whom it is sought to be enforced in another State. Such a right, arising under the common law, is enforceable everywhere. Such a right, arising under a local statute, will be enforced *ex comitate* in another State, unless there is a good reason

[1859] Ibid., p. 376.

[1860] Cf. supra, under *a* and *e*.

[1861] For a more extended discussion of this topic, see Beale, Foreign Corporations, chap. xviii.

[1862] Richardson v. New York Central R. Co., 98 Mass. 85, 89.

for refusing to enforce it. It will be enforced, not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him. If the statute creating the right is against the policy of the law of the neighboring State, that is a sufficient reason for refusing to enforce the right there. In the neighboring State, in such a case, it will not be considered a right. If the enforcement of a statutory right in a neighboring State in the manner proposed will work injustice to its citizens, considerations of comity do not require the recognition of it by the courts of that State. If the right, by the terms of the statute creating it, is to be enforced by prescribing proceedings within the State, the right is limited by the statute, and can only be enforced in accordance with the statute. If it is of such a kind that, with a due regard for the interests of the parties, a proper remedy can be given only in the jurisdiction where it is created, it will not be enforced elsewhere. But if there is a substantive right of a kind which is generally recognized, courts through comity ought to regard it, and enforce it as well when it arises under a statute of another State as when it arises at common law, unless there is some good reason for disregarding it." [1863]

And in another case:

"That the statutes of a State do not operate extra-territorially, *proprio vigore,* will be conceded. How far they should be enforced beyond the limits of the State which has enacted them must depend upon several considerations; as whether any wrong or injury will be done to the citizens of the State in which they are sought to be enforced, whether the policy of its own laws will be contravened or impaired, and whether its courts are capable of doing complete justice to those capable of being affected by their decrees.

"Where the rights sought to be passed upon and determined are those which arise from the relation between a corporation and its members, they depend upon the local law which exists at the place of its creation, and true policy would seem to

[1863] Howarth v. Lombard, 175 Mass. 570, 572, per Knowlton, J. Cf. Francis v. Hazlett, 192 Mass. 137.

require us to leave them to be there determined. The liability which the stockholders are alleged to be under to the corporation and its creditors has little analogy to a debt due according to the generally recognized principles of law. It is of a peculiar character, involving the organic law by which the corporation is created, and requiring local administration." [1864]

Accordingly, in various cases the court here has declined to determine the relation existing between a foreign corporation and its members and the obligations arising therefrom,[1865] although allowing discovery here in aid of actions in the chartering State.[1866]

But where a stockholder has been obliged to pay a judgment against a corporation in accordance with the laws of the chartering State, he may bring a bill for contribution in this State against other solvent stockholders, as the right to contribution goes with such a person into any State where there are stockholders.[1867] And he need not make any demand upon or take any proceedings against the corporation before bringing his bill for contribution.[1868] On the other hand, any payment of corporate debts will be deemed to have been voluntary, in the absence of proof that he was legally liable therefor.[1869]

k. — Liability how determined.

The statutes of the chartering State, imposing a liability upon stockholders, as interpreted by the courts of that State, determine the nature and extent of such liability.[1870] This

[1864] New Haven Horse Nail Co. v. Linden Spring Co., 142 Mass. 349, 353, per Devens, J. Cf. Bishop v. Globe Co., 135 Mass. 132, 136; Hutchins v. New England Coal Mining Co., 4 Allen, 580; Halsey v. McLean, 12 Allen, 438.

[1865] New Haven Horse Nail Co. v. Linden Spring Co., 142 Mass. 349; Halsey v. McLean, 12 Allen, 438; Smith v. Mutual Ins. Co., 14 Allen, 336, 341; Kansas, etc., Construction Co. v. Topeka, etc., R. Co., 135 Mass. 34; Post v. Toledo, etc., Railroad, 144 Mass. 341, 345.

[1866] Post v. Toledo, etc., R. Co., 144 Mass. 341.

[1867] Putnam v. Misochi, 189 Mass. 421.

[1868] Putnam v. Misochi, 189 Mass. 421.

[1869] Eastman v. Crosby, 8 Allen, 206.

[1870] Beale, For. Corp., § 442; Nashua Savings Bank v. Anglo-American, etc., Co., 189 U. S. 221; Hancock National Bank v. Farnum, 176 U. S. 640; Francis v. Hazlett, 192 Mass. 137, 141; Clark v. Knowles, 187 Mass.

is shown, for example, in the matter of set off. If a stockholder is entitled by the law of the chartering State to any set off, he is equally entitled to it in Massachusetts or any other jurisdiction in which he may be sued.[1871]

The nature and extent of the liability must be determined by the courts of the chartering State for two reasons. First, because they are the proper tribunals to interpret the law of that State. Second, because they have jurisdiction over the corporation. If the corporation is not made a party to proceedings in the chartering State, our courts will not enforce the decrees of the foreign State in proceedings affecting the liability of the stockholders here.[1872] Even the appearance by attorney of the corporation in the Massachusetts court would not enable the latter to control properly the corporation.[1873]

Further, the stockholders of a foreign corporation are presumed to know the statute law of the chartering State;[1874] and by virtue of their membership in the corporation are, like the corporation itself, within the jurisdiction of the courts of such State "so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. . . . In reference to this kind of liability, such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation."[1875] This principle applies

35, 39; New Haven Horse Nail Co. v. Linden Spring Co., 142 Mass. 349, 353; Hutchins v. New England Coal Mining Co., 4 Allen, 580; Blackstone Manufacturing Co. v. Blackstone, 13 Gray, 488; Penobscot, etc., Railroad v. Bartlett, 12 Gray, 244; Jones v. Sisson, 6 Gray, 288; Farr v. Briggs, 72 Vt. 225; Tompkins v. Blakey, 70 N. H. 584.

Cf. Union Cattle Co. v. International Trust Co., 149 Mass. 492 (as to sale of collateral trust bonds).

[1871] Broadway National Bank v. Baker, 176 Mass. 294; Sargent v. Stetson, 181 Mass. 371.

[1872] Francis v. Hazlett, 192 Mass. 139; Clark v. Knowles, 187 Mass. 35; Hancock National Bank v. Ellis, 172 Mass. 39, 45.

[1873] New Haven, etc., Nail Co. v. Linden Spring Co., 142 Mass. 349, 355; Clark v. Knowles, 187 Mass. 35, 38.

[1874] Howarth v. Lombard, 175 Mass. 570, 576.

[1875] Howarth v. Lombard, 175 Mass. 570, 577, per Knowlton, J., citing Hawkins v. Glenn, 131 U. S. 319; Great Western Telegraph Co. v. Purdy,

to assessments for unpaid subscriptions,[1876] and to assessments on stockholders under a statutory double liability.[1877] But when the liability has been determined by the courts of the chartering State, it may be enforced in an action here, like any matter of simple contract.[1878]

On the other hand, the general statute of limitations of a foreign jurisdiction is not available to a defendant in Massachusetts, because it has no force here, and the Massachusetts[1879] statute of limitations does not run in favor of a foreign corporation which cannot be sued here.[1880]

Conversely, if a claim against a stockholder is barred by the Massachusetts statute of limitations, a plaintiff creditor cannot evade it by recovering judgment in a foreign jurisdiction and then suing on the judgment here.[1881]

l. — Liability for unpaid subscription.

The liability for calls for unpaid instalments of subscription is a mere matter of contract between the stockholder and the corporation,[1882] and the latter may enforce it in Massachusetts.[1883]

162 U. S. 329, 336; Glenn v. Liggett, 135 U. S. 533; Sanger v. Upton, 91 U. S. 56, 58; Glenn v. Williams, 60 Md. 93, 116; Marson v. Deither, 49 Minn. 423, 426; Lewis v. Glenn, 84 Va. 947, 970, 979; Hamilton v. Glenn, 85 Va. 901. See also Francis v. Hazlett, 192 Mass. 137, 141; Childs v. Cleaves, 95 Me. 498; Tompkins v. Blakey, 70 N. H. 584.

[1876] Howarth v. Lombard, 175 Mass. 570, 577.

[1877] Ibid. Cf. the liability under the national banking act, by which the controller can levy binding assessments although the stockholders have no notice of the making of them. U. S. Rev. St., § 5234; United States v. Knox, 102 U. S. 422.

[1878] Howarth v. Lombard, 175 Mass. 570. See infra, under *l*.

[1879] Broadway National Bank v. Baker, 176 Mass. 294; Sargent v. Stetson, 181 Mass. 371.

[1880] Sargent v. Stetson, 181 Mass. 371. Cf. Rockwood v. Whiting, 118 Mass. 337.

[1881] Stebbins v. Scott, 172 Mass. 356.

[1882] Howarth v. Lombard, 175 Mass. 570, 576; Post v. Toledo, etc., R. R., 144 Mass. 341, 344; Hancock Nat. Bank v. Ellis, 166 Mass. 414. See Electric Welding Co. v. Prince, 81 N. E. 306 (Mass. 1907).

[1883] Anglo-American Land Co. v. Dyer, 181 Mass. 593; Hawkins v. Glenn, 131 U. S. 319; Segua Iron Co. v. Brown, 171 N. Y. 488; Stoddard v. Lum, 159 N. Y. 265.

In an action here for an unpaid subscription the stockholder is entitled to the same defences to which he would be entitled in the chartering State,[1884] and a creditor suing here is in no better position in this respect than the corporation itself would be.[1885]

Thus, if the plaintiff would have been barred in the chartering State by his neglect in failing to sue within the period of limitations, he cannot sue here.[1886]

m. — Statutory liability to the corporation.

Where the statute of the chartering State makes stockholders liable to pay debts, the corporation or its receiver may sue, after a call, in this State.[1887]

n. — Liability to creditors — Direct and contingent liability.

The liability of a stockholder to creditors of the corporation is direct and absolute where he is liable for debts to the amount of stock held by him. It is contingent where he is liable only for that proportion of the total debts which his stock bears to the total stock. It is apparent that to ascertain his liability in the latter case there must be an equitable accounting and all stockholders should be before the court; while in the former case what the stockholder is to pay is definitely fixed without reference to the total debts or the other stockholders.[1888]

Direct liability.

Where the statute of the chartering State provides that stockholders shall be directly liable to creditors, with rights of

[1884] Hastings Lumber Co. v. Edwards, 188 Mass. 587, 591; Penobscot, etc., R. Co. v. Bartlett, 12 Gray, 244; Great Western Telegraph Co. v. Purdy, 162 U. S. 329; Glenn v. Marbury, 145 U. S. 499; Bank of China v. Morse, 168 N. Y. 458.

[1885] New Haven, etc., Co. v. Linden Spring Co., 142 Mass. 349.

[1886] Halsey v. McLean, 12 Allen, 433, 438. Cf. Bishop v. Globe Co., 135 Mass. 132.

[1887] Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888; Childs v. Cleaves, 95 Me. 498, 50 Atl. 714; Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489.

[1888] Flash v. Conn, 109 U. S. 371, 380.

contribution from the other stockholders, such liability can be enforced here.[1889]

Judgment in a foreign State in favor of a creditor is conclusive in Massachusetts as to the existence of the debt.[1890]

Contingent liability.

Where there is no direct and absolute obligation on the part of the stockholder under the laws of the foreign State, an action will not be allowed here, on the ground that complete justice can be rendered only in the home jurisdiction.[1891]

But if the creditor goes into the home jurisdiction "the members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability, such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation." [1892] Although there may be some question whether, in every case, even the courts of the chartering State can acquire jurisdiction over all the stockholders, wherever they reside, to determine their liability under its statutes.[1893]

Even if this should be decided in the negative, however, it would not influence our court to take jurisdiction.[1894]

o. — Form of remedy.

It frequently happens that the law of the chartering State prescribes peculiar remedies which cannot be afforded in Massa-

[1889] Hancock National Bank v. Farnum, 176 U. S. 640; Hancock National Bank v. Ellis, 172 Mass. 39, 51 N. E. 207; Broadway National Bank v. Baker, 176 Mass. 294, 57 N. E. 603; Howarth v. Angle, 162 N. Y. 179.

[1890] Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888.

[1891] New Haven, etc., Co. v. Linden Spring Co., 142 Mass. 349, 7 N. E. 773; Bank of North America v. Rindge, 154 Mass. 203, 27 N. E. Rep. 1015; Coffing v. Dodge, 167 Mass. 231, 45 N. E. 928.

[1892] Howarth v. Lombard, 175 Mass. 570, 577, per Knowlton, J.; Hawkins v. Glenn, 131 U. S. 319; Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 336; Glenn v. Liggett, 135 U. S. 533; Sanger v. Upton, 91 U. S. 56, 58.

[1893] Hancock National Bank v. Ellis, 172 Mass. 39, 45; Clark v. Knowles, 187 Mass. 35, 40.

[1894] Clark v. Knowles, 187 Mass. 35, 40.

chusetts. In such a case the stockholder can be held there but not here.[1895]

Thus, if the law of the chartering State provides that all creditors shall join in an equitable proceeding against the corporation and all the stockholders, neither an action at law,[1896] nor a creditor's bill in equity,[1897] will lie in Massachusetts; for it is not the kind of action contemplated by the statute.

A creditor in such a case must go into the chartering State and obtain a judgment, upon which he can then proceed in Massachusetts.[1898] Such a course may not lead to satisfactory results, as, for example, where the corporation has been dissolved, so that it cannot be made a party in the foreign jurisdiction;[1899] and, as we have seen, it may be that even the courts of the chartering State could not acquire jurisdiction of all non-resident stockholders,[1900] so as to lay a foundation for a proceeding in Massachusetts.

One who chooses to sue in Massachusetts must of course conform to the practice here, and cannot claim the benefit of statutory remedies established in other jurisdictions.[1901] Therefore, where the Massachusetts practice requires, for example, certain parties as necessary to the jurisdiction, the creditor cannot rely upon a decision of the chartering State to the effect that such parties are not necessary.[1902]

[1895] Hancock National Bank v. Ellis, 172 Mass, 39, 45; Remington v. Samana Bay Co., 140 Mass. 494; Rice v. Merrimac Hosiery Co., 56 N. H. 114; Halsey v. McLean, 12 Allen, 438.

[1896] Erickson v. Nesmith, 15 Gray, 221.

[1897] Erickson v. Nesmith, 4 Allen, 233; Clark v. Knowles, 187 Mass. 35, 39.

See Post v. Toledo, etc., Railroad, 144 Mass. 341; New Haven, etc., Co. v. Linden Spring Co., 142 Mass. 349; Hale v. Allinson, 188 U. S. 56; Finney v. Guy, 189 U. S. 335; Marshall v. Sherman, 148 N. Y. 9; Bates v. Day, 198 Pa. St. 513; Miller v. Smith, 26 R. I. 146.

[1898] Broadway National Bank v. Baker, 176 Mass. 294, 57 N. E. 603.

[1899] Remington v. Samana Bay Co., 140 Mass. 494.

[1900] Hancock National Bank v. Ellis, 172 Mass. 39, 45; Clark v. Knowles, 187 Mass. 35, 40.

[1901] Clark v. Knowles, 187 Mass. 35, 39.

See Drinkwater v. Portland Mar. Ry., 18 Me. 35.

[1902] Clark v. Knowles, 187 Mass. 35, 39.

p. Liability of non-resident stockholders in foreign corporations.

As we have seen, the Massachusetts statutes authorize the attachment of shares of stockholders in domestic or federal corporations.[1903] But, at common law, shares of stock in a foreign corporation owned by a non-resident defendant could not be attached;[1904] and there is no statute authorizing such attachment in this State; therefore, there can be no such attachment.[1905]

It has been held, however, that if the certificate has been endorsed in blank so as to be practically a chattel, it can be attached in the hands of a resident bailee.[1906]

§ 63. Foreign corporations may hold real estate.[1907]

"Foreign corporations organized for any purpose for which domestic corporations may be organized under the provisions of section seven, which have complied with the provisions of sections fifty-eight and sixty, may purchase and hold such real estate in this commonwealth as may be necessary for conducting their business."[1908]

§ 64. Issue of stock on domestic franchises.

"If a foreign corporation which owns or controls a majority of the capital stock of a domestic street railway, gas light or electric light corporation issues stock, bonds or other evidences of indebtedness based upon or secured by the property, franchise or stock of such domestic corporation, unless such issue is authorized by the laws of this commonwealth, the supreme judicial court shall have jurisdiction in equity in its discretion to dissolve such domestic corporation. If it appears to the attorney-general

[1903] Supra, § 28, *f*. Cf. as to execution, R. L., c. 177, § 46.

[1904] Pinney v. Nevills, 86 Fed. Rep. 97 (C. C., Mass.); Plimpton v. Bigelow, 93 N. Y. 592; Ireland v. Reduction Co., 19 R. I. 180; Winslow v. Fletcher, 53 Conn. 390.

[1905] Pinney v. Nevills, 86 Fed. Rep. 97.

[1906] Simpson v. Jersey City Contracting Co., 47 App. Div. 17, 61 N. Y. S. 1033.

[1907] As to mortgages to and by foreign corporations, see supra, § 4, *zb*.

[1908] St. 1903, c. 437, § 63; R. L., c. 126, § 10; St. 1895, c. 387; St. 1888, c. 321. No material citations to 193 Mass.

This provision is substantially the same as in the Revised Laws.

that such issue has been made, he shall institute proceedings for the dissolution of such corporation and for the proper disposition of its assets. The provisions of this section shall not affect the right of foreign corporations, their officers or agents to issue stock and bonds in fulfilment of contracts existing on the fourteenth day of July in the year eighteen hundred and ninety-four." [1909]

A foreign railroad corporation, if authorized by its charter, may acquire the securities and assume the ownership of domestic street railways.[1910]

§ 65. Certificate of increase or decrease of capital.

"All foreign corporations of the classes described in section fifty-eight, and such foreign corporations as are engaged in the business of selling or negotiating bonds, mortgages, notes or other choses in action, shall, within thirty days after the payment in of an increase of capital stock, upon payment of the fee hereinafter provided, file in the office of the secretary of the commonwealth a certificate of the amount of such increase and the fact of such payment, signed and sworn to by its president, treasurer and a majority of its directors or officers having the powers usually exercised by directors. Within thirty days after the vote of such corporation authorizing a reduction of its capital stock, a copy of such vote, signed and sworn to by the clerk of the corporation, shall, upon payment of the fee hereinafter provided, be filed in the office of the secretary of the commonwealth." [1911]

[1909] St. 1903, c. 437, § 64; R. L., c. 126, § 11; St. 1894, c. 476. Not cited to 193 Mass.

This provision is substantially the same as in the Revised Laws.

[1910] 2 Op. Atty.-Gen. 420. See as to the consolidation of railroad companies, St. 1907, c. 585.

[1911] St. 1903, c. 437, § 65; R. L., c. 126, § 12; St. 1895, c. 311, § 1; St. 1891, c. 341, §§ 1, 3, 4. No material citations to 193 Mass. See 1 Op. Atty.-Gen. 583.

This section as it stands is broader than that in the Revised Laws because it includes, (1) not only foreign corporations having a usual place of business in the State, but also those engaged in the construction, repair, etc., of buildings, railways, etc.; (2) mining and manufacturing companies actually conducting their operations entirely outside of the commonwealth.

While the second of these two classes of additional corporations was still exempted from filing the certificate, it was held that a corporation engaged in dyeing and business pertinent thereto was not a manufacturing corporation so as to be exempt. 1 Op. Atty.-Gen. 583.

According to the practice, the certificate of increase of capital need not be filed until the whole of the increase is paid in.

§ 66. Annual certificate of condition.

"Every foreign corporation of the classes described in section fifty-eight shall annually, within thirty days after the date fixed for its annual meeting last preceding the date of such certificate, or within thirty days after the final adjournment of said meeting, but not more than three months after the date so fixed for said meeting, prepare and file in the office of the secretary of the commonwealth, upon payment of the fee hereinafter provided, a certificate signed and sworn to by its president, treasurer and by a majority of its board of directors showing the amount of its authorized capital stock, and its assets and liabilities as of a date not more than ninety days prior to said annual meeting, in such form as is required of domestic corporations under the provisions of section forty-five, and the change or changes, if any, in the other particulars included in the certificate required by section sixty made since the filing of said certificate or of the last annual report." [1912]

The date for filing the certificate is now within thirty days after the annual meeting, as in the case of domestic corporations.[1913]

Foreign corporations may, therefore, in some cases have to change the date of their annual meeting or the date of their fiscal year to correspond with the requirements of the act, or else have a special account made up, as under this section the account must be made up as of not more than ninety days prior to the annual meeting. The object of this provision is to make the reports uniformly fresh when filed.

This section and the one following apply to corporations

[1912] St. 1905, c. 233; St. 1903, c. 437, § 66; R. L., c. 126, § 13; St. 1895, c. 311, § 1; St. 1891, c. 341, § 1.

Cited in Heard v. Pictorial Press, 182 Mass. 530; Attorney-General v. Electric Storage Battery Co., 188 Mass. 239; Friedenwald Co. v. Warren, 81 N. E. 207. Formerly the annual certificate was to be filed in March.

[1913] See supra, § 45.

doing both an interstate and domestic business, but not to those doing a purely interstate business.[1914]

As to the liability for false statements in reports, see supra, § 60, and infra, § 70.

§ 67. Approval of certificate.

"A certificate which is required to be filed by the preceding section shall be accompanied by a written statement under oath by an auditor, as provided in section forty-seven, except that such auditor shall in all cases be chosen by the board of directors. Before it is filed, it shall be submitted to the commissioner of corporations together with the evidences of the payment of any taxes which may have been assessed upon the corporation by any city or town in the Commonwealth for the year last preceding. The commissioner of corporations shall examine said certificate and said evidences and shall, as tax commissioner, assess upon the corporation an excise tax, if any is due, in accordance with the provisions of section seventy-five. If he finds that the certificate is in compliance with the requirements of the preceding section, he shall indorse his approval thereon; but no certificate shall be filed until he has indorsed his approval thereon and until the excise tax required by section seventy-five if any is due has been paid to the treasurer and receiver general." [1915]

§ 68. Penalty for not filing certificate.

"If a foreign corporation of the classes described in section fifty-eight omits to file the certificate required by section sixty-six, the commissioner of corporations shall give notice to the corporation of its default, by mail, postage prepaid, directed to the resident manager, if any, in the United States, or to any other person designated by the corporation, by written notice filed in the office of the commissioner, as provided in section fifty-nine for notice of the service of legal process. If it fails to file such certificate within thirty days after such notice of default has been mailed, it shall forfeit to the commonwealth not less than

[1914] Attorney General v. Electric Storage Battery Co., 188 Mass. 239.

[1915] St. 1903, c. 437, § 67; R. L., c. 126, § 14; St. 1897, c. 492; St. 1891, c. 341, § 5.

Citations. — St. 1903, c. 437, § 67: Attorney-General v. Electric Storage Battery Co., 188 Mass. 239.

five nor more than ten dollars for each day for fifteen days after the expiration of the said thirty days, and not less than ten nor more than two hundred dollars for each day thereafter during which such omission continues, or any other sum, not greater than the maximum penalty or forfeiture, which the court may deem just and equitable, which shall be recovered as provided in section fifty." [1916]

The provision for notice in this section took effect May 3, 1906. Previously, the only provision as to notice was that contained in the next section.

§ 69. Notice to delinquent corporation.

"The commissioner of corporations, upon the failure of any such corporation to file the certificate required by section sixty-six, shall forthwith notify such corporation, and the notice shall contain a copy of this and the four preceding sections and of section fifty." [1917]

The manner of giving notice is now regulated by the preceding section.

§ 70. Liability of officers.[1917a]

"The officers of foreign corporations of the classes described in section fifty-eight shall be jointly and severally liable for all the debts and contracts of the corporation contracted or entered into while they are officers thereof, if any statement or report which is required by the provisions of this act is made by them which is false in any material representation and which they know to be false; but only the officers who sign such statement or report shall be so liable. Such liability shall be enforced upon the conditions and in the manner prescribed by sections thirty-six, thirty-seven and thirty-nine." [1918]

Under the Revised Laws, the stockholders of certain foreign

[1916] St. 1906, c. 346, § 2; St. 1903, c. 437, § 68; R. L., c. 126, § 15; St. 1894, c. 541, §§ 1, 3; St. 1891, c. 341, § 2. Not cited to 193 Mass.

[1917] St. 1903, c. 437, § 69; R. L., c. 126, § 16; St. 1894, c. 541, § 4. Not cited to 193 Mass.

This section is substantially the same as in the Revised Laws.

[1917a] Cf. supra, § 60, *c*.

[1918] St. 1903, c. 437, § 70; R. L., c. 126, §§ 17, 19; St. 1896, c. 391, §§ 1, 2; St. 1897, c. 423.

Cited in Standard Asphalt Co. v. Merrimac Paving Co., 81 N. E. Rep. 262.

corporations were liable for debts and contracts, as well as the officers, in the same manner as was provided for domestic corporations. But this liability attached only in the case of corporations having established a usual place of business in the State since May 12, 1896. Also there was no liability for bonded or mortgage debt under the statute.[1919]

Under this section, officers who certify that property of a corporation is worth $120,000, when in fact it is worth less than $10,000, and they know it to be worth less than $10,000, are liable.[1920] And, in such a case, it is no defence that they did not intend to sell stock or obtain credit by means of the statements contained in the certificate, nor that the plaintiff was not in fact deceived, nor that the defendants purported to give only the estimated value.[1921] "They must have known that the meaning of the certificate to those who should read it would be that this was an estimated value given in good faith, and that if this was a value stated on the books of the company, the books would be presumed to be kept in the ordinary way, so as show with a reasonable approximation to accuracy the facts stated in them."[1922]

As we have seen,[1923] the guilty knowledge intended by the statute must be equivalent to bad faith. Mere errors do not create liability.[1924]

[1919] R. L., c. 126, § 17 made the officers and stockholders of foreign corporations liable to the same extent as those of domestic corporations under R. L., c. 110, §§ 58-68, except as to § 58, cl. 4.

This clause 4 provided that the officers of a domestic corporation signing a statement should be liable if property had been conveyed to the corporation at an unfair valuation.

R. L., c. 126, § 18 made all officers and stockholders participating in a conveyance to the corporation at an unfair valuation liable without reference to whether they signed a false statement or not.

See Anthony, etc., Co. v. Metropolitan Art Co., 190 Mass. 35. In Standard Asphalt Co. v. Merrimac Paving Co., 81 N. E. 262, it was held that R. L., c. 110, § 58, cl. 6 was not extended to foreign corporations by R. L., c. 126, § 17.

[1920] Heard v. Pictorial Press, 182 Mass. 530.

[1921] Ibid.

[1922] Ibid., p. 533, per Knowlton, C. J.

[1923] Supra, § 60, *c*.

[1924] Cf. as to domestic corporations, supra, § 34, *e*.

It would seem that the provisions of this section are already covered by section 60.[1925]

K. TAXATION.

§ 71. Local taxation.[1926]

"Every corporation which is organized or created under the laws of this commonwealth and which is subject to the provisions of this act shall be subject to taxation upon all real estate and machinery owned by it and situated in this commonwealth by the city or town in which said real estate or machinery is situated, and every foreign corporation which is subject to the provisions of this act shall be subject to taxation upon all real estate, machinery and merchandise owned by it and situated in this commonwealth by the city or town in which such property is situated. The taxes authorized by the provisions of this section shall be assessed, collected and paid in accordance with the provisions of chapters twelve and thirteen of the Revised Laws." [1927]

a. In general.

Domestic corporations have never been liable to be taxed for any personal property owned by them, except machinery employed in manufactures.[1928] This was on the theory of avoiding double taxation, and was not based on any difficulty of

[1925] See supra, § 60, *d*.

[1926] As to local taxation of foreign corporations, see infra, § 75, *d*.

[1927] St. 1903, c. 437, § 71.

Cited in Brooks v. West Springfield, 193 Mass. 195; Scollard v. American Felt Co., 194 Mass. 127. This provision is similar to that of the previous law. See R. L., cc. 12, 14.

As to the history of the taxation of corporations, see opinion of Hammond, J., in Worcester v. Board of Appeal, 184 Mass. 460, 461; New England, etc., S. S. Co. v. Commonwealth, 81 N. E. 286.

See also "The Taxation of Corporations in Massachusetts" by H. G. Friedman, in Columbia University Studies.

[1928] Murray v. Berkshire Life Ins. Co., 104 Mass. 586; Boston, etc., Glass Co. v. Boston, 4 Met. 181; Worcester Ins. Co. v. Worcester, 7 Cush. 600; Worcester County Institution for Savings v. Worcester, 10 Cush, 128; Middlesex Railroad Co. v. Charlestown, 8 Allen, 330; Com. v. Berkshire Ins. Co., 98 Mass. 25; Dunnell Manuf. Co. v. Pawtucket, 7 Gray, 277; Salem Iron Factory v. Danvers, 10 Mass. 514.

The general rule is otherwise in Maine. Portland, etc., R. Co. v. Saco, 60 Me. 196; Baldwin v. Ministerial Fund, 37 Me. 369.

ascertaining the residence of the corporation.[1929] In accordance with this principle, a corporation is not taxable on its net profits distributed to stockholders;[1930] nor on the cash in its treasury.[1931]

It will be noticed that the rule as to foreign corporations is different from that applicable to domestic corporations, and that the merchandise of the former is taxable locally.[1932]

b. Method of assessment.

The valuations of property in previous years are not evidence of value in subsequent years, but the mere fact that the assessors or the county commissioners have consulted previous valuations in making up their opinion is not a ground for quashing the assessment.[1933]

The land, buildings and machinery are not a single unit for purposes of taxation, but the machinery, being personal property, is to be valued separately, and an abatement may be had on the land and machinery, whether all these, taken together, are overvalued or not.[1934] Where a whole manufacturing plant is of more value if kept together than it would be if moved to different places, the value of the buildings, machinery, etc., should be taken as when each part is used in connection with the rest.[1935]

Even though a corporation has no other property than its real estate and machinery, and has no debts, the sales of its stock are not conclusive of the value of its assets, but are only one piece of evidence to be considered with other pertinent facts.[1936]

c. — Land and buildings.

The true rule of valuation for mill property is "that the valuation of the land and buildings in the aggregate must be

1929 Worcester v. Board of Appeal, 184 Mass. 460, 464.

1930 Boston Water Power Co. v. Boston, 9 Met. 199.

1931 Fall River v. County Commissioners, 125 Mass. 567; Boston, etc., Glass Co. v. Boston, 4 Met. 181.

1932 Infra, § 75.

1933 Lowell v. County Com'rs, 152 Mass. 372, 380, 25 N. E. Rep. 469.

1934 Hamilton Mfg. Co. v. Lowell, 185 Mass. 114.

1935 Troy Cotton, etc., Mfy. v. Fall River, 167 Mass. 517, 46 N. E. Rep. 99.

1936 Chicopee v. County Commissioners, 16 Gray, 38, 40.

equal to the full and fair cash value of the whole parcel, including the land and buildings as they exist at the time as of which the valuation is made, considered with reference to all practicable uses to which the parcel of land, with the buildings upon it, can be put."[1937]

Water power, appurtenant to mill property, is to be taxed with the land.[1938] The bed of a canal owned by a manufacturing company is taxable to it, although others have the right to use the water flowing over it; *aliter,* where the corporation has merely the right of maintaining buildings over the bed.[1939] But the corporation is not taxable locally on the mere right of flowing land.[1940] Nor is it taxable for land used under a license from the owner.[1941]

If the land and buildings are overvalued, an abatement may be had, although the land, buildings and machinery, taken together, are not overvalued.[1942]

The provisions of statute making a mortgagee's interest real estate applies to mortgages held by a corporation, which are therefore taxable locally as real estate.[1943]

d. — Machinery.

"Machinery," in these statutes, is not necessarily machinery which has been affixed to land in such a manner as to become a part of the real estate.[1944] Although machinery "situated

[1937] Tremont & Suffolk Mills v. Lowell, 163 Mass. 283, 288, 39 N. E. Rep. 1028, per Field, C. J.

[1938] Lowell v. County Com'rs, 152 Mass. 372, 383, 25 N. E. Rep. 469; Pingree v. County Com'rs, 102 Mass. 76; Fall River v. County Com'rs, 125 Mass. 567; Flax Pond Water Co. v. Lynn, 147 Mass. 31, 16 N. E. Rep. 742.

[1939] Lowell v. County Com'rs, 152 Mass. 372, 25 N. E. Rep. 469.

[1940] Fall River v. County Com'rs, 125 Mass. 567.

[1941] Hamilton Manuf. Co. v. Lowell, 185 Mass. 114, 118.

[1942] Hamilton Manuf. Co. v. Lowell, 185 Mass. 114.

[1943] R. L., c. 12, § 16. Firemen's Ins. Co. v. Commonwealth, 137 Mass. 80. Cf. Brooks v. West Springfield, 193 Mass. 190.

As to the taxation of mortgage bonds, see supra, § 4, *et.*

[1944] Troy Cotton, etc., Mfy. v. Fall River, 167 Mass. 517, 522, 46 N. E. Rep. 99. Cf. Lowell v. County Com'rs, 152 Mass. 372, 377, 25 N. E. Rep. 469; Boston & Sandwich Glass Co. v. Boston, 4 Met. 181; Com v. Hamilton Mfg. Co., 12 Allen, 298, 309; Tremont, etc., Mills v. Lowell, 163 Mass. 283, 39 N. E. Rep. 1028.

or employed" in manufactures is to be classified in general as personal estate, yet it, "on account of its fixed character and connection with the buildings in which it is used, has been regarded as in the nature of real estate, and so taxable in the place where it is situated."[1945] If it is doubtful whether machinery is real or personal property, it seems that it should properly be classed as the latter, giving the lien only upon what is plainly real estate.[1946]

Movable copper rolls, mills and dies used in a calico-printing factory are not necessarily parts of the machinery in the factory for purposes of taxation.[1947] The gas pipes and meters of a gas company, used for distributing gas, are machinery within the corresponding provisions of former acts, though gas companies are not within the scope of the present act;[1948] but even under those acts it was otherwise with the distributing plant of an acqueduct company, on the ground that the latter was not a manufacturing corporation, and so not entitled to the benefit of the deduction.[1949]

The land, buildings and machinery are not a unit for purposes of taxation, and the machinery being personal property, is to be valued separately; and an abatement may be had whether all taken together are overvalued or not.[1950]

Where, in a list of property furnished by a corporation, a mill with a certain number of "spindles" is enumerated, if this word is understood by all parties to mean the capacity of the mill, and includes all the machinery, etc., and the assessors ask for no fuller statement, this is sufficient.[1951]

e. Stockholders in foreign corporations.

Stockholders in foreign corporations are taxable, in the city or town in which they reside, on the fair market value of their

[1945] Com. v. Hamilton Mfg. Co., 12 Allen, 298, 309; Troy Cotton, etc., Mfy. v. Fall River, 167 Mass. 517, 523, 46 N. E. Rep. 99.

[1946] Hamilton Manuf. Co. v. Lowell, 185 Mass. 114, 118.

[1947] Lowell v. County Com'rs, 152 Mass. 372, 377, 25 N. E. Rep. 469.

[1948] Com. v. Lowell Gas Light Co., 12 Allen, 79.

[1949] Dudley v. Jamacia Pond Aqueduct Co., 100 Mass. 184.

[1950] Hamilton Manuf. Co. v. Lowell, 185 Mass. 114.

[1951] Troy Cotton, etc., Mfy. v. Fall River, 167 Mass. 517, 46 N. E. Rep.

shares, without regard to any taxes paid by the corporation upon its franchise, real estate or machinery in the chartering State [1952] or elsewhere.

§ 72. Valuation of corporate franchise.

"The tax commissioner shall annually ascertain from the returns required by the provisions of this act, or in any other manner, the market value of the shares of the capital stock of each domestic corporation which is subject to the provisions of this act, and shall estimate therefrom the fair cash value of all of the shares constituting its capital stock on the preceding first day of May, which shall, for the purposes of this act, be taken as the value of its corporate franchise. From such value there shall be deducted the value as found by the tax commissioner of its real estate and machinery within the commonwealth subject to local taxation and of securities which, if owned by a natural person resident in this commonwealth, would not be liable to taxation; also the value as found by the tax commissioner of its property situated in another state or country and subject to taxation therein. From such value there shall not be deducted securities which, if owned by a natural person resident in this commonwealth, would be liable to taxation. For the purposes of this section, the tax commissioner may take the value at which such real estate and machinery is assessed in the city or town where it is situated as its true value, but such local assessment shall not be conclusive of its value." [1953]

99. Cf. Great Barrington v. County Com'rs, 112 Mass. 218; Wright v. Lowell, 166 Mass. 298, 44 N. E. Rep. 249.

[1952] Dwight v. Boston, 12 Allen, 316.

[1953] St. 1903, c. 437, § 72; R. L., c. 14, § 38; St. 1898, c. 417; St. 1886, c. 270; St. 1885, c. 238, § 1; Pub. St., c. 13, §§ 39, 40; St. 1880, c. 117, § 2; St. 1865, c. 283, §§ 4, 5; St. 1864, c. 208, §§ 5, 6.

Citations. — St. 1903, c. 437, § 72: American Glue Co. v. Commonwealth, 81 N. E. 302; N. E. S. S., etc., Co. v. Commonwealth, 81 N. E. 286.

Pub. St., c. 13, § 39: Firemen's Ins. Co. v. Commonwealth, 137 Mass 81; Boston Manufacturing Co. v. Commonwealth, 144 Mass. 598, 12 N. E. Rep. 362; Lowell v. County Com'rs, 146 Mass. 408, 16 N. E. Rep. 8; Lowell v. County Com'rs, 152 Mass. 374, 25 N. E. Rep. 469; Boston & Albany R. R. v. Commonwealth, 157 Mass. 70, 31 N. E. Rep. 696; Troy Cotton, etc., Mfy. v. Fall River, 167 Mass. 522, 46 N. E. Rep. 99; Atty.-Gen. v. Mass., etc., Gas Co., 179 Mass. 20, 60 N. E. Rep. 389; Worcester v. Board of Appeal, 184 Mass. 465.

a. Valuation of capital stock — Examination of returns etc.

The examination of the corporation returns for the purpose of determining the valuation need not be made by the tax commissioner personally, but may be made by clerks employed by him.[1954]

Inasmuch as the commissioner may ascertain the value of shares "in any other manner," a failure of the assessors to return to him the names of corporations and the works, structures, real estate and machinery owned by them in any town, according to the statute requirement, does not prevent a valid franchise tax being levied.[1955]

Pub. St., c. 13, § 40: Greenfield v. County Com'rs, 135 Mass. 569; Firemen's Ins. Co. v. Commonwealth, 137 Mass. 81; Pratt v. Street Com'rs of Boston, 139 Mass. 564, 2 N. E. Rep. 675; Lowell v. County Com'rs, 146 Mass. 408, 16 N. E. Rep. 8; Lowell v. County Com'rs, 152 Mass. 374, 25 N. E. Rep. 469; Boston & Albany R. R. v. Commonwealth, 157 Mass. 70, 31 N. E. Rep. 696; Troy Cotton, etc., Mfy. v. Fall River, 167 Mass. 522, 40 N. E. Rep. 99; Tremont & Suffolk Mills v. Lowell, 178 Mass. 471, 42 N. E. Rep. 1134; Atty.-Gen. v. Mass., etc., Gas Co., 179 Mass. 20, 60 N. E. Rep. 389; Worcester v. Board of Appeal, 184 Mass. 465.

St. 1865, c. 283, § 4: Boston & Lowell R. R. Co. v. Commonwealth, 100 Mass. 399; Pratt v. Street Commissioners, 139 Mass. 561, 2 N. E. Rep. 675.

St. 1865, c. 283, § 5: Firemen's Ins. Co. v. Commonwealth, 137 Mass. 83; Pratt v. Street Commissioners, 139 Mass. 561, 2 N. E. Rep. 675.

St. 1864, c. 208, § 5: Com. v. Lowell Gas Light Co., 12 Allen, 76; Com. v. Hamilton Mfg. Co., 12 Allen, 300; Com. v. Cary Improvement Co., 98 Mass. 19; Com. v. Berkshire Life Ins. Co., 98 Mass. 26; Dudley v. Jamaica Pond Aqueduct Co., 100 Mass. 184; Traders & Mechanics' Ins. Co. v. Brown, 142 Mass. 413, 8 N. E. Rep. 134.

See also, generally, Commonwealth v. New England Slate & Tile Co., 13 Allen, 391; Fall River v. County Com'rs, 125 Mass. 568; Western Union Telegraph Co. v. Taggart, 163 U. S. 1.

The principal difference between this section and the corresponding provision of the Revised Laws is that in estimating the excess of the franchise value the deductions from the market value of all the shares are:

Old Law. — Taxable real estate and machinery within or without the State.

New Law. — (1) Taxable real estate and machinery within the State. (2) Non-taxable Massachusetts securities. (3) Taxable property outside the State.

As to the abatement of taxes, see infra, §§ 73, 76.

[1954] Commonwealth v. New England, etc., Tile Company, 13 Allen, 391.

[1955] See St. 1904, c. 181; R. L., c. 12, § 93, and Com. v. New England, etc., Tile Co., 13 Allen, 391.

b. — Jurisdiction of commissioner.

The matter of valuation of shares is one that cannot be reviewed by petition to the courts, the only jurisdiction of the latter being to ascertain whether there has been a wrongful assessment of a tax or excise upon that which was not the proper subject of taxation.[1956]

c. — What shares are to be valued.

In ascertaining the aggregate value of the shares of capital stock, proposed and unissued new shares are not to be included;[1957] but the fact that a portion of the stockholders of a corporation live in other States will not exempt it from liability to pay the full tax on all its shares issued.[1958]

Although a partnership has divided its capital into shares which are transferable, and has adopted other forms of managing its business similar to those of corporations, this does not authorize the application of the corporation tax laws to the property of such an association.

d. — Basis of valuation.

The object of this section is to determine the amount of taxation upon an equitable basis.[1959]

It is no objection to the valuation of the tax commissioner that the market price is fixed by sales of shares which, though actual, are speculative and largely exceed the value of all the property of the corporation;[1960] and it seems that in the absence of sales, the opinion of the treasurer, who is also the president of another corporation owning the shares, may be some evidence of their value.[1961]

It is the aggregate value of all the shares which must be taken as the value of the franchise for taxation; and it makes

[1956] Boston Mfg. Co. v. Com., 144 Mass. 598, 12 N. E. Rep. 362. Cf. infra, § 84.

[1957] Boston & Albany R. Co. v. Com., 157 Mass. 68, 31 N. E. Rep. 696. Cf. R. L., c. 14, §§ 37, 38, 40.

[1958] Com. v. Hamilton Mfg. Co., 12 Allen, 300.

[1959] American Glue Co. v. Commonwealth, 81 N. E. 302.

[1960] Com. v. Cary Improvement Co., 98 Mass. 19.

[1961] Aldrich v. Bay State Construction Co., 186 Mass. 489.

no difference that by reason of the privileges more or less permanently attached to some of the shares, there is a difference in the market value.[1962] Therefore, where a corporation declared a large dividend on existing shares, payable after six years to the then holders, either in cash or in stock, and then created new stock, but the value of the old shares to which the dividend attached was much higher than the new, it was held that the tax commissioner should add the market value of the old shares to that of the new, without making any deduction on account of the dividend;[1963] for, if such a dividend were paid in stock, such stock would add nothing to the aggregate market value of all the shares, because the value of the privilege would always be added to the shares to which it is attached.[1964]

The following statute deals with debts of corporations:

"The tax commissioner, in determining for the purposes of taxation the value of the corporate franchise of any corporation which is required to make returns according to the provisions of section forty-five of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, shall not take into consideration any debts of such corporation, unless the returns required from it contain a statement duly signed and sworn to, as provided for in said section, setting forth that no part of such debts was incurred for the purpose of reducing the amount of taxes to be paid by it." [1965]

e. Deductions.

As to the valuation of real estate, buildings and machinery, see supra, § 71, b, c and d.

The object of the deduction was to prevent double taxation in fact, if not in form, and to insure that the property of a corporation, which, under the laws, was subject to local taxation, should not be included in the valuation upon which the

[1962] Boston & Lowell R. R. v. Com., 100 Mass. 399.

[1963] Ibid. As to when a dividend is a stock dividend, see also Davis v. Jackson, 152 Mass. 58; Rand v. Hubbell, 115 Mass. 461; Daland v. Williams, 101 Mass. 571.

[1964] Boston & Lowell R. R. v. Com., 100 Mass. 399; Com. v. Hamilton Mfg. Co., 12 Allen, 305.

[1965] St. 1907, c. 395, § 1, in effect May 8, 1907.

excise on the franchise is based.[1966] The franchise tax and the local tax on real estate and machinery are in no sense, however, complementary taxes.[1967]

"The deduction, from the value of a capital stock thus ascertained, of the value of the real estate and machinery thus returned as subject to local taxation, does not indicate that this 'excess' thus obtained represents in any sense the other personal property of the corporation, nor that it is intended as the measure of the value of such other property. The legislature saw fit to relieve corporations from the burden of this tax to the extent to which they were subject to local taxation upon their property; and this purpose could be effected with greatest simplicity and uniformity by the mode adopted."[1968]

"By the term 'real estate, machinery and merchandise' the legislature intended to cover all the tangible property of a business corporation; and by the term 'securities,' as used in the statute, all choses in action which would be taxable to a natural person resident in Massachusetts. Any different construction of this clause would operate to exempt certain kinds of business corporations from all taxes except the taxes on real estate. Take, for example, an express business using no taxable property except horses and wagons. The owner, merely by incorporating it, would pay no tax at all."[1969]

f.—Real estate.

As to the valuation of real estate in determining the franchise tax, there should be deducted from the aggregate value of the shares the value of mortgages of real estate held by the corporation and subject to local taxation.[1970] "In 1881, the legislature passed a statute, which was re-enacted without ma-

[1966] Firemen's Ins. Co. v. Commonwealth, 137 Mass. 81; Com. v. Hamilton Mfg. Co., 12 Allen, 298, 306; Boston & Sandwich Glass Co. v. Boston, 4 Met. 181, 184.

[1967] Tremont & Suffolk Mills v. Lowell, 178 Mass. 469, 59 N. E. Rep. 1007.

[1968] Commonwealth v. Cary Improvement Co., 98 Mass. 19, 22, per Wells, J.

[1969] 2 Op. Atty.-Gen. 558.

[1970] Firemen's Ins. Co. v. Commonwealth, 137 Mass. 80.

terial change in the Public Statutes, providing that, for purposes of taxation, the interest of a mortgagee should be assessed as real estate, and that he and the mortgagor should be deemed joint owners.[1971] This statute made the interest of a mortgagee, for all purposes of taxation, real estate subject to local taxation, and thus brought such interest within the words of St. of 1865,[1972] which require the tax commissioner to deduct an amount equal to the value 'of their real estate and machinery, subject to local taxation, wherever situated.'" [1973]

Land leased by the corporation and upon which it is taxed, and buildings erected thereon by the corporation, may be deducted in ascertaining the tax.[1974] And real estate is to be deducted even if used for other purposes than those for which the corporation is organized;[1975] but it seems that leased land is not to be deducted if it does not enter into the market value of the shares.[1976]

Shares in real estate trusts and the bonds of such trusts are to be deducted as securities, though there is no title to land in the shareholders.[1977]

g. — Machinery.

As to what is entitled to be deducted as "machinery," see supra, § 71, d.

h. — Securities.

The deduction of securities which would not be taxable in the hands of a natural resident person is a new provision.[1978]

[1971] St. 1881, c. 304, see R. L., c. 12, § 16.

[1972] St. 1865, c. 283, § 5.

[1973] Firemen's Ins. Co. v. Commonwealth, 137 Mass. 81.

[1974] 2 Op. Atty.-Gen. 556.

[1975] Ibid.

[1976] Ibid.

[1977] 2 Op. Atty.-Gen. 558, overruling 2 Op. Atty.-Gen. 402. Cf. Knight v. Boston, 159 Mass. 551; Hoadley v. County Commissioners, 105 Mass. 519; Gleason v. McKay, 134 Mass. 419.

[1978] Formerly the failure to make such a deduction was no ground for the abatement of a franchise tax, nor was such a deduction proper. Manufacturers' Ins. Co. v. Loud, 99 Mass. 146; Com. v. Hamilton Mfg.

Deductions can be made only so far as authorized by statute.[1979]

Securities not taxable.

These are: (a) Bonds of the United States and legal tender treasury notes;[1980] (b) stocks of domestic corporations for any year for which they pay a franchise tax;[1981] (c) stocks of foreign corporations paying a franchise tax here;[1982] (d) deposits in Massachusetts savings banks;[1983] (e) shares in voluntary associations and real estate trusts;[1984] (f) bonds of a real estate trust;[1984a] (g) notes receivable, though unsecured, taken by the corporation in payment for notes in settlement of accounts.[1985]

Taxable securities.

In addition to those specifically mentioned in R. L., c. 12, may be mentioned deposits in foreign savings banks.[1986]

i. — Property in other states.

The value of tangible property in other States and taxable therein is to be deducted. But no deduction is to be made on account of the fact that a part of the value of the corporate franchise is property situated in another State.[1987]

Co., 12 Allen, 300; Com. v. Provident Inst. for Savings, 12 Allen, 312, 6 Wall. 611.

[1979] Com. v. New England, etc., Tile Co., 13 Allen, 391, 393.

[1980] U. S. St. 1862, c. 33, § 2; U. S. St. 1863, c. 73, § 1; Bank v. Supervisors, 7 Wall. 26; Banks v. Mayor, 7 Wall. 16.

[1981] See infra, § 86.

[1982] This is the practice of the tax commissioner, based on the principle of avoiding double taxation. The writer understands that the commissioners who prepared the corporation law did not intend to make this exemption.

[1983] 2 Op. Atty.-Gen. 558.

[1984] 2 Op. Atty.-Gen. 558, overruling 2 Op. Atty.-Gen. 402. Cf. Knight v. Boston, 159 Mass. 551; Hoadley v. County Commissioners, 105 Mass. 519.

[1984a] 2 Op. Atty.-Gen. 402.

[1985] 2 Op. Atty.-Gen. 558.

[1986] 2 Op. Atty.-Gen. 558.

[1987] American Glue Co. v. Commonwealth, 81 N. E. 302. Cf. Louisville, etc., Ferry Co. v. Kentucky, 188 U. S. 385; Western Union Telegraph

§ 73. Appeal from local valuation.

"The tax commissioner may require a corporation to prosecute an appeal from the valuation of its real estate or machinery by the assessors of a city or town, either to the county commissioners or to the superior court, whose decision shall be conclusive upon the question of value. Upon such appeal the tax commissioner may be heard, and in the superior court costs may be awarded as justice requires." [1988]

a. Application to the assessors for an abatement.

A corporation aggrieved by the taxes assessed upon it may, within six months after the date of its tax bill, apply to the assessors for an abatement thereof,[1989] even though the effect of granting the petition will be the abatement of the whole of the tax.[1990] But it is not entitled to any abatement by the assessors unless it has filed the required statement of its property,[1991] although it may appeal from the refusal of the as-

Co. v. Massachusetts, 125 U. S. 530; Massachusetts v. Western Union Telegraph Co., 141 U. S. 40; New York v. Roberts, 171 U. S. 658; Delaware, etc., R. Co. v. Pennsylvania, 198 U. S. 341; Home Ins. Co. v. New York, 134 U. S. 594.

[1988] St. 1903, c. 437, § 73; R. L., c. 14, § 39; St. 1898, c. 417; St. 1890, c. 127, § 7; Pub. St., c. 13, § 41; St. 1865, c. 283, § 6.

Citations. — St. 1890, c. 127, § 7: Tremont, etc., Mills v. Lowell, 163 Mass. 283, 39 N. E. Rep. 1028; Tremont, etc., Mills v. Lowell, 165 Mass. 266, 42 N. E. Rep. 1134; Wright v. Lowell, 166 Mass. 300, 44 N. E. Rep. 249; Troy Cotton, etc., Mfy. v. Fall River, 167 Mass. 518, 46 N. E. Rep. 99; Williams College v. Williamstown, 167 Mass. 508, 46 N. E. Rep. 394; N. E. Theosophical Corp. v. Boston, 172 Mass. 60, 51 N. E. Rep. 456; Tremont & Suffolk Mills v. Lowell, 178 Mass. 471, 59 N. E. Rep. 1007; Harrington v. Glidden, 179 Mass. 486, 61 N. E. Rep. 54; Gardiner v. Brookline, 181 Mass. 162, 63 N. E. Rep. 397.

Pub. St., c. 13, § 41: Firemen's Ins. Co. v. Commonwealth, 137 Mass. 81; Lowell v. County Com'rs, 146 Mass. 408, 16 N. E. Rep. 8; Lowell v. County Com'rs, 152 Mass. 374, 25 N. E. Rep. 469; Troy Cotton, etc., Mfy. v. Fall River, 167 Mass. 522, 46 N. E. Rep. 99.

This section is the same as in the Revised Laws.

[1989] R. L., c. 12, § 73, cited in Milford Water Co. v. Hopkinton, 192 Mass. 497; Amherst College v. Amherst, 193 Mass. 177.

[1990] Milford Water Co. v. Hopkinton, 192 Mass. 491.

[1991] R. L., c. 12, §§ 41, 74; St. 1853, c. 319, § 3. Otis Co. v. Ware, 8 Gray, 509; Winnisimmett Co. v. Chelsea, 6 Cush. 477, 483; Milford Water Co. v. Hopkinton, 192 Mass. 491, 498; Amherst College v. Amherst, 193 Mass. 168; Brooks v. West Springfield, 193 Mass. 192. As to interest and

sessors to abate the tax even where it has not filed any statement.[1992]

"The assessors shall, within ten days after their decision upon an application for an abatement, give written notice thereof to the applicant." [1993]

This seems to imply that previous proceedings may be oral.[1994]

b. — Estoppel to ask for an abatement.

The only estoppel upon a corporation against asking for an abatement of a tax on the ground of excessive valuation, if there can be any, is by reason of statements made to the assessors which misled them.[1995]

The refusal of the person making a list of property to answer all necessary inquiries does not prevent the obtaining of an abatement, although it may relieve the assessors from the obligation of considering the list as correct.[1996]

As we have seen,[1997] the corporate franchise tax and the local tax on real estate and machinery are not complementary taxes. Therefore, the assessors are not bound by the valuation adopted by the tax commissioner, and if the latter adopts the valuation of the assessors, and the corporation pays the tax on that basis, it may still apply to the assessors for an abatement of the tax and appeal from their decision.[1998]

c. — Grounds of abatement.

Where a corporation pays a tax on land, buildings and machinery, if the land and buildings are overvalued, it is entitled to an abatement, even though the total valuation may be fair.[1999]

charges in connection with abatements, see R. L., c. 12, § 81 and Wright v. Lowell, 166 Mass. 298, 44 N. E. Rep. 249.

[1992] Infra, under *e*. These provisions seem inconsistent.

[1993] R. L., c. 12, § 76; St. 1890, c. 127, § 6.

[1994] Page v. Melrose, 186 Mass. 364.

[1995] Troy Cotton, etc., Mfy. v. Fall River, 167 Mass. 517, 46 N. E. Rep. 99.

[1996] Wright v. Lowell, 166 Mass. 298, 44 N. E. Rep. 249.

[1997] Supra, § 72, *g*.

[1998] Tremont, etc., Mills v. Lowell, 178 Mass. 469, 39 N. E. Rep. 1028.

[1999] Hamilton Manuf. Co. v. Lowell, 185 Mass. 114.

Probably an abatement cannot be asked for of the tax on land or on buildings separately, where all constitute one parcel of real estate,[2000] and it cannot be had because the assessors have valued different lots together, instead of by items, as directed by the statute.[2001]

Where a tax is assessed upon a corporation by a valuation of the separate parcels of real estate belonging to it, and the corporation proves that any one or more is overvalued, it is entitled to an abatement; and the inquiry whether other lots have been valued at too low a rate is not open to the town or city. It cannot ask that the valuation on other property of the complainant shall be raised, in order to make a set-off against that part of the assessment which is shown to be excessive. Neither the assessors nor the county commissioners have any jurisdiction or authority to increase the valuation or assessment made by the assessors on any parcel of property.[2002]

d. Taxation in case of abatement.

"Whenever an abatement is finally made to any corporation organized under the law of this commonwealth and liable to a corporate franchise tax upon any tax assessed by the assessors of any city or town, upon or in respect of real estate, machinery or underground conduits, wires and pipes, the assessors, commissioners or court granting such abatement shall forthwith notify the tax commissioner of the commonwealth thereof, and shall state in such notice what sum was determined by such assessors, commissioners or court to have been the full and fair cash value of such real estate, machinery or underground conduits, wires and pipes on the first day of May on which the tax so abated was originally assessed." [2003]

[2000] Tremont & Suffolk Mills v. Lowell, 163 Mass. 283, 288, 39 N. E. Rep. 1028.

[2001] Lowell v. County Com'rs, 152 Mass. 372, 385, 25 N. E. Rep. 469. Cf. Pub. St., c. 11, §§ 41, 53, 69, 71. Cf. Lincoln v. Worcester, 8 Cush. 55; Tobey v. Wareham, 2 Allen, 594; Noyes v. Hale, 137 Mass. 266; Sprague v. Bailey, 19 Pick. 436; Torrey v. Millbury, 21 Pick. 64; Westhampton v. Searle, 127 Mass. 502; Bemis v. Caldwell, 143 Mass. 299, 9 N. E. Rep. 623; Boston Water Power Co. v. Boston, 9 Met. 199, 204; Hamilton Manuf. Co. v. Lowell, 185 Mass. 114, 117.

[2002] Lowell v. County Com'rs, 3 Allen, 546; Lowell v. County Com'rs, 146 Mass. 403, 411, 16 N. E. Rep. 8; Lowell v. County Com'rs, 152 Mass. 372, 385, 25 N. E. Rep. 469; Tremont & Suffolk Mills v. Lowell, 163 Mass. 283, 288, 39 N. E. Rep. 1028.

[2003] St. 1904, c. 442, § 1, in effect June 8, 1904.

"When the tax commissioner has received notice of an abatement of the taxes of any corporation as provided in section one of this act, he shall assess upon such corporation an additional tax upon the corporate franchise value of such corporation, in such amount as shall make the total franchise tax equal that which would have been assessed by said commissioner had the valuation as established by said abatement been adopted by him when making his original assessment upon the corporate franchise value of such corporation, which said additional tax shall be paid and collected as an addition to the franchise tax next to be assessed and laid upon said corporation after such abatement, and such additional tax, when collected, shall be distributed as if it were part of said original tax." [2004]

e. Appeal from valuation of assessors.

The present act provides for an appeal from the valuation of the real estate or machinery by the assessors either to the county commissioners or to the superior court.[2005]

Appeal to county commissioners.

"A person aggrieved by the refusal of assessors to abate a tax may, within thirty days after receiving the notice provided in the preceding section, appeal therefrom by filing a complaint with the clerk of the county commissioners, or of any board exercising the powers of such commissioners, for the county in which the property taxed is situated, and if upon a hearing the board finds that the property has been overrated, it shall make a reasonable abatement and an order as to costs. [If the list required to be brought in to the assessors was not brought in within the time specified in the notice required by section forty-one, the tax shall not be abated unless the appellate board finds that there was good cause for the delay, or unless the assessors have so found as provided in section seventy-four. No costs shall be allowed to a complainant who has failed to file a list as required by law] " [2006]

[2004] St. 1904, c. 442, § 2.

[2005] *Historical.* Prior to April 27, 1890, the appeal was only to the county commissioners. St. 1890, c. 127. Cf. Pub. St., c. 11, § 71; c. 13, § 41. Under the original act the valuation of the tax commissioner was not subject to revision by any tribunal. Com. v. Cary Improvement Co., 98 Mass. 19.

[2006] R. L., c. 12, § 77; St. 1882, c. 218; Pub. St., c. 11, §§ 71, 72; Gen. St., c. 11, §§ 45, 46; St. 1857, c. 306, § 3; St. 1853, c. 319, § 3; Rev. St., c. 7, §§ 39, 40; St. 1785, c. 50, §§ 9, 10. Lincoln v. Worcester, 8 Cush. 55; Lowell v. County Com'rs, 6 Allen, 131; Stone v. Charlestown, 114 Mass. 224; Lowell v. County Com'rs, 152 Mass. 372, 25 N. E. Rep. 469; Hussey v. Crawford, 152 Mass. 596, 26 N. E. Rep. 424; Nat. Bank of Commerce v. New Bedford, 155 Mass. 313, 29 N. E. Rep. 532; Boott Cotton Mills v. Lowell, 159 Mass. 383, 34 N. E. Rep. 367.

A corporation is entitled to appeal from the valuation of the assessors to the board of county commissioners, although it has not filed a sworn statement of its property, as provided by Rev. Laws, c. 12, §§ 41, 74, and has no good excuse for failing to do so.[2007] In this respect it differs from an individual.[2008]

Where an appeal has been made to the county commissioners for an abatement of taxes, the sole question before them is as to whether the property has been valued at its fair cash value, and it is immaterial whether it has been valued by the assessors at more or less, relatively, than similar property of other persons.[2009]

Where assessors were applied to for an abatement October 19, and on November 16 refused to grant one, and notified the corporation December 8, it was held that a complaint filed with the clerk of the county commissioners December 17 was seasonable, the corporation being entitled to one month from actual notice of the decision of the assessors.[2010]

Appeal to the court.

The provision for appeals to the court is as follows:

"A person aggrieved as aforesaid may, instead of pursuing the remedy provided in the preceding section, but subject to the same conditions, appeal to the Superior Court for the county in which the property taxed is situated by entering a complaint in said court on the first return day after the expiration of thirty days from the giving of the notice required by section seventy-six, which shall be heard and determined as other court causes by the court sitting without a jury." [2011]

See also Com. v. Hamilton Mfg. Co., 12 Allen, 298; Firemen's Fire Ins. Co. v. Com., 137 Mass. 80.

[2007] Lowell v. County Com'rs, 146 Mass. 403, 409, 410, 16 N. E. Rep. 8; Page v. Melrose, 186 Mass. 363.

[2008] Cf. Harrington v. Glidden, 179 Mass. 486, 491, 61 N. E. Rep. 54, and R. L., c. 12, § 74; Pub. St., c. 11, §§ 69–72; St. 1890, c. 127.

[2009] Lowell v. County Com'rs, 152 Mass. 372, 25 N. E. Rep. 469, decided under Pub. St., c. 11, §§ 41, 45, 69, 71, and St. 1885, c. 355. Cf. Lowell v. County Com'rs, 6 Allen, 131.

[2010] Lowell v. County Com'rs, 146 Mass. 403, 16 N. E. Rep. 8. Cf. R. L., c. 12, §§ 76, 77.

[2011] R. L., c. 12, § 78; St. 1890, c. 127, §§ 1, 2, 4. Hussey v. Crawford, 152 Mass. 594, 26 N. E. Rep. 424; Nat. Bank of Commerce v. New Bedford, 155 Mass. 313, 29 N. E. Rep. 532; Tremont & Suffolk Mills v. Lowell,

§ 74. Taxation of corporate existence.

"Every domestic corporation which is subject to the provisions of this act shall in each year pay to the treasurer and receiver-general a tax upon the value of its corporate franchise, after making the deductions provided for in section seventy-two, at a rate equal to the average of the annual rates for the three years preceding that in which the assessment is laid, the annual rate to be determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same year as returned by the assessors of the several cities and towns under the provisions of section ninety-three of chapter twelve of the Revised Laws, as amended by this act, after deducting therefrom the amount of tax assessed upon polls for the preceding year, as certified to the secretary, upon the aggregate valuation of all cities and towns for the preceding year as returned under sections sixty and sixty-one of said chapter of the Revised Laws. But the said tax upon the value of the corporate franchise after making the deductions provided for in section seventy-two, shall not exceed a tax levied at the rate aforesaid upon an amount, less said deductions, twenty per cent in excess of the value, as found by the tax commissioner, of the real estate, machinery and merchandise, and of securities which if owned by a natural person resident in this commonwealth would be liable to taxation; and the total amount of tax to be paid by such corporation in any year upon its property locally taxed in this commonwealth and upon the value of its corporate franchise shall amount to not less than one tenth of one per cent of the market value of its capital stock at the time of said assessment as found by the tax commissioner. If the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town for the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination." [2012]

163 Mass. 283, 39 N. E. Rep. 1028; Nat. Bank of Commerce v. New Bedford, 175 Mass. 257, 56 N. E. Rep. 288; Page v. Melrose, 186 Mass. 364.

[2012] St. 1906, c. 271, § 12; St. 1904, c. 261; St. 1903, c. 437, § 74; R. L., c. 14, § 40; St. 1898, c. 417; St. 1888, c. 413, § 24; St. 1886, c. 270; St. 1885, c. 238, § 1; Pub. St., c. 13, § 40; St. 1880, c. 117, § 2; St. 1865, c. 283, § 5; St. 1864, c. 208, § 5.

Citations. — St. 1904, c. 261: Mexican Central R. Co. v. Commonwealth, 192 Mass. 130, 131.

a. Constitutionality of franchise tax.

The Constitution of Massachusetts[2013] gives to the legislature the power "to impose and levy reasonable duties and excises upon any . . . commodities whatsoever . . . being within the same."

It was early decided that the franchise or privilege of being a corporation was a "commodity" within the meaning of this section of the Constitution, and that a tax on the capital stock

St. 1903, c. 437, § 74: Mexican Central R. Co. v. Commonwealth, 192 Mass. 130, 131; N. E., etc., S. S. Co. v. Commonwealth, 81 N. E. 286.

St. 1888, c. 413, § 24: Nash v. Brown, 165 Mass. 384, 43 N. E. Rep. 180.

Pub. St., c. 13, § 40: Greenfield v. County Com'rs, 135 Mass. 569; Firemen's Ins. Co. v. Commonwealth, 137 Mass. 81; Pratt v. Street Com'rs of Boston, 139 Mass. 564, 2 N. E. Rep. 675; Lowell v. County Com'rs, 146 Mass. 408, 16 N. E. Rep. 8; Lowell v. County Com'rs, 152 Mass. 374, 25 N. E. Rep. 469; Boston & Albany R. R. v. Commonwealth, 157 Mass. 70, 31 N. E. Rep. 696; Troy Cotton, etc., Mfy. v. Fall River, 167 Mass. 522, 46 N. E. Rep. 99; Tremont & Suffolk Mills v. Lowell, 178 Mass. 471, 59 N. E. Rep. 1007; Atty.-Gen. v. Mass., etc., Gas Co., 179 Mass. 20, 60 N. E. Rep. 389; Worcester v. Board of Appeal, 184 Mass. 465; 1 Op. Atty.-Gen. 571.

St. 1865, c. 283, § 5: Firemen's Ins. Co. v. Commonwealth, 137 Mass. 83; Pratt v. Street Com'rs of Boston, 139 Mass. 561, 2 N. E. Rep. 675.

St. 1864, c. 208, § 5: Com. v. Lowell Gas-Light Co., 12 Allen, 76; Com. v. Hamilton Mfg. Co., 12 Allen, 300; Com. v. Cary Improvement Co., 98 Mass. 19; Com. v. Berkshire Life Ins. Co., 98 Mass. 26; Dudley v. Jamaica Pond Aqueduct Corp., 100 Mass. 184; Traders & Mechanics' Ins. Co. v. Brown, 142 Mass. 413, 8 N. E. Rep. 134.

See also, generally, Manufacturers' Ins. Co. v. Loud, 99 Mass. 146; Atty.-Gen. v. Bay State Mining Co., 99 Mass. 151; Hoadley v. County Commissioners, 105 Mass. 527; Hamilton Co. v. Massachusetts, 6 Wall. 632; Plummer v. Coler, 178 U. S. 115, 120.

Historical. This section marks an important departure from the system of franchise tax under the Revised Laws.

Old Law. — No maximum and no minimum tax.

New Law. — Maximum, not to exceed tax on an amount less the deductions equal to 120 per cent. of the real estate, machinery, merchandise and non-taxable securities of the corporation. Minimum, not less than one-tenth of one per cent. of market value of capital stock at the time of the assessment, less the amount of the local tax.

Prior to April 11, 1906, the rate was fixed by the amount to be raised in the same year, and not by the average of the rate for the preceding three years.

[2013] Chapter I, Section I, Article IV.

of a corporation was therefore valid.[2014] This construction has been followed in a long line of later decisions, holding such a tax to be upon the franchise and not upon the property of the corporation.[2015]

Certain corporations created by special charter may be made liable to taxation like other corporations;[2016] and the present tax applies to corporations formed to do business in foreign countries, even though engaged in public service operations.[2017]

b. History of the tax.[2018]

"Under the early tax acts a domestic corporation was assessed for its real estate only, while its personal property was reached for taxation only through an assessment upon the

[2014] Portland Bank v. Apthorp, 12 Mass. 252.

[2015] Boston Mfg. Co. v. Com., 144 Mass. 598, 12 N. E. Rep. 362; Commonwealth v. Hamilton Mfg. Co., 12 Allen, 298; Commonwealth v. Cary Improvement Co., 98 Mass. 19, 22; Commonwealth v. Berkshire Ins. Co. 98 Mass. 25; Commonwealth v. Lancaster Savings Bank, 123 Mass. 493; Manufacturers' Ins. Co. v. Loud, 99 Mass. 146; Lowell v. County Com'rs, 146 Mass. 408, 16 N. E. Rep. 8; Portland Bank v. Apthorp, 12 Mass. 252; Atty.-Gen. v. Bay State Mining Co., 99 Mass. 148; Com. v. People's, etc., Savings Bank, 5 Allen, 428; Com. v. Provident Institution for Savings, 12 Allen, 312; Atty.-Gen. v. Mass., etc., Gas Co., 179 Mass. 15, 19, 60 N. E. Rep. 389; Tremont & Suffolk Mills v. Lowell, 178 Mass. 469, 59 N. E. Rep. 1007; Nat. Bank of Commerce v. New Bedford, 155 Mass. 313, 29 N. E. Rep. 532; Oliver v. Washington Mills, 11 Allen, 268, 274; Pratt v. Street Com'rs, 139 Mass. 559, 561, 2 N. E. Rep. 675; Com. v. Lowell Gas Light Co., 12 Allen, 75, 76; Com. v. N. E. Slate, etc., Co, 13 Allen, 391, 393; Conn. Ins. Co. v. Com., 133 Mass. 161; O'Keefe v. Somerville, 190 Mass. 110; New England, etc., S. S. Co. v. Commonwealth, 81 N. E. 286.

See also Com. v. New England, etc., Tile Co., 13 Allen, 391; Gleason v. McKay, 134 Mass. 419; American Glue Co. v. Commonwealth, 81 N. E. 302; Hamilton Co. v. Massachusetts, 6 Wall. 632; W. U. Tel. Co. v. Taggart, 163 U. S. 1; Plummer v. Coler, 178 U. S. 115, 120; Passaic Water Co. v. Paterson, 56 N. J. L. 471, 34 Atl. Rep. 1061; Pipe Line Co. v. Berry, 52 N. J. L. 308, 19 Atl. Rep. 665, 53 N. J. L. 212, 21 Atl. Rep. 490.

[2016] Greenfield v. County Com'rs, 135 Mass. 566 (in this case, however, it was held there was no liability to a franchise tax). Cf. St. 1885, c. 208, § 6; St. 1886, c. 301, § 9.

[2017] Mexican Central R. Co. v. Commonwealth, 192 Mass. 129.

[2018] For a general history of the taxation of corporations, see Worcester v. Board of Appeal, 184 Mass. 460; Firemen's Ins. Co. v. Com., 137 Mass. 81, 82; N. E., etc., S. S. Co. v. Commonwealth, 81 N. E. 286.

shareholders based upon the market value of the shares.[2019] This was liable to result in double taxation so far as respected the value of the real estate. This system was considerably modified by St. 1832, c. 158, which provided that machinery belonging to a corporation should be assessed in the place where the machinery was situated, and that in assessing the shares of a manufacturing corporation there should 'first be deducted from the value thereof the value of the machinery and real estate belonging to such corporation otherwise specifically taxed.' As thus modified the system, with some changes not here material, stood for many years.[2020]

"But for obvious reasons this method of reaching for taxation the personal property of domestic corporations, especially that part of it whose value was represented by shares held by shareholders residing out of the Commonwealth, was defective; and during the civil war, public attention having been called more sharply to the question of taxation, an attempt was made by St. 1863, c. 236, to tax the interest of non-resident stockholders. This statute was declared unconstitutional.[2021] But before this decision was announced the statute had been repealed and by St. 1864, c. 208, a valid franchise tax had been substituted.[2022]

"This statute marks the change from a property tax to a

[2019] Salem Iron Factory v. Danvers, 10 Mass. 514.

[2020] Rev. St., c. 7, § 10; Gen. St., c. 11, § 12: Worcester v. Board of Appeal, 184 Mass. 460.

[2021] Oliver v. Washington Mills, 11 Allen, 268.

[2022] Commonwealth v. Hamilton Manuf. Co., 12 Allen, 298.

A corporation paying a franchise tax was not liable for cash in its treasury. Fall River v. County Com'rs, 125 Mass. 568; Boston, etc., Glass Co. v. Boston, 4 Met. 181. A tax assessed upon a corporation, under St. 1864, c. 208, was valid, although the assessors of the city or town in which the corporation was established omitted to make returns to the treasurer of the commonwealth, as required by that statute; and although the tax commissioners made no attempt to ascertain the value of the corporation's real estate and machinery situated out of the commonwealth, and made no deduction from the amount of the tax on account thereof, or on account of the taxes paid by the corporation upon its real estate and machinery situated out of the commonwealth, or upon shares owned by it in another corporation established here. Commonwealth v. New England Slate & Tile Co., 13 Allen, 391. Cf. R. L., c. 12, § 93.

franchise tax. Roughly speaking, the statute provided for a franchise tax upon every domestic corporation of one and one-tenth per cent. of the market value of all the shares of its stock less certain deductions. In the case of certain corporations, including those like these petitioners, the only deductions to be made were the value of the real estate and machinery. These were to be locally assessed where situated. The shareholders were not to be assessed for their stock. By St. 1865, c. 293, the rate was changed from one and one-tenth per cent. to the average tax rate of all the cities and towns. The system thus established by these two statutes was substantially continued down to the enactment of St. 1903, c. 437, under which these cases arise.[2023] As before stated, under this system the real estate and machinery were assessed to the corporation where the property was situated. There was no tax upon the personal property as such, either to the corporation or the individual shareholders, nor were the shareholders assessed for these shares, but instead thereof there was a franchise tax upon the corporation based upon the market value of its shares less the value of its real estate and machinery." [2024]

c. Effect of corporation neglecting or ceasing to do business.

"The franchise which subjects the corporation to taxation is the right to do business legally by complying with the laws. A corporation having this right under legislative action cannot relieve itself from liability to taxation by neglecting to do business, or ceasing to do business. Its franchise remains, and it may do business when it chooses. Nor can it escape taxation by failing to comply with a statute which is intended to regulate its conduct while doing business, or before commencing business. Whatever the effect of such conditions upon the amount to be assessed, after it once has a capital stock divided into shares nothing short of the loss of the franchise as a power that may be exercised, if the corporation chooses to

[2023] Pub St., c. 13, §§ 38–41; R. L., c. 14, §§ 37–42.

[2024] New England, etc., S. S. Co. v. Commonwealth, 81 N. E. 286, per Hammond, J.

comply with the law, can leave it free from liability to taxation under the statute." [2025]

d. Returns by assessors to tax commissioner.

R. L., c. 12, § 93, as amended by St. 1904, c. 181, and referred to in this section, reads as follows:

"Assessors shall annually, on or before the first Monday of August, return to the tax commissioner the names of all corporations, except banks of issue and deposit, having a capital stock divided into shares, chartered by the commonwealth or organized under the general laws for the purposes of business or profit and established in their respective cities and towns or owning real estate therein, and a statement in detail of the works, structures, real estate and machinery owned by each of said corporations and situated in such city or town, with the value thereof, on the first day of May preceding, and the amount at which the same is assessed in said city or town for the then current year. They shall also, at the same time, return to the tax commissioner the amount of taxes laid, or voted to be laid, within said city or town, for the then current year, for state, county and town purposes. They shall also, at the same time, return to the tax commissioner the names of all foreign corporations which have a usual place of business within said city or town. If the assessors neglect to comply with the requirements of this section, each assessor so neglecting shall forfeit one hundred dollars."

The failure of the assessors to comply with this statute does not, however, invalidate a franchise tax.[2026]

e. The maximum and minimum — Theory of these provisions.

"The evident theory upon which this clause proceeds is this: A corporation having no property except real estate, merchandise and stock in process of manufacture, all of which are taxed, whether owned by a corporation or a natural person, may have a valuable good-will, created by the brains of its managers, which will bring the market value of its capital stock far above the value of its tangible property. This good-

[2025] Attorney-General v. Mass., etc., Gas Co., 179 Mass. 15, 19, 60 N. E. Rep. 389, per Knowlton, J., citing Com. v. Lancaster Savings Bank, 123 Mass. 493.

[2026] Com. v. New England, etc., Tile Co., 13 Allen, 391.

will, which is not taxed to a natural person who owns real estate, machinery and stock in process of manufacture, it was the belief of the legislature, ought not to be too heavily taxed to a corporation; but some tax more than a natural person would have to pay ought to be imposed, in return for the advantage derived from the privilege of being a corporation. This amount was roughly set at a sum derived from taking the current tax rate upon 20 per cent. in excess, as found by the tax commissioner of the real estate, machinery and merchandise, and of securities which, if owned by a natural person resident in this Commonwealth, would be liable to taxation; then, to guard against the case of a corporation having intangible property enormously in excess of its tangible property, a minimum limit was fixed by the provision that a corporation must pay, both in local and State taxes, at least an amount equal to one-tenth of one per cent. of the market value of its capital stock." [2027]

f. — Formulae of the maximum and minimum.

The provisions of section 74 are not very clearly worded to show the basis of taxation, but the meaning is as follows:

Maximum = 120% of (all real estate, machinery and merchandise wherever situated,[2028] and taxable securities)—(real estate and machinery, and non-taxable securities, and property out of the State).

Or, in other words, the basis of the maximum tax = $^1/_5$ of (all real estate, all machinery, and taxable merchandise out of Mass.) + $^6/_5$ of (taxable merchandise in Mass. and taxable securities)—(non-taxable securities and other taxable property out of Mass.).

Minimum = $^1/_{1000}$ of the market value of the capital stock — local tax on real estate and machinery.

In this section the word "merchandise" is used in a broad sense, and includes steamships used partly outside the Commonwealth in the coastwise trade.[2029]

[2027] 2 Op. Atty. Gen. 558.

[2028] American Glue Co. v. Commonwealth, 81 N. E. 302.

[2029] New England, etc., S. S. Co. v. Commonwealth, 81 N. E. 286.

g. — Examples of the straight tax, where neither the maximum nor the minimum applies.

Suppose a mining corporation operating in another State, with a capital of $1,000,000; non-taxable securities, $100,000; taxable securities, $50,000; merchandise, $50,000, and real estate and machinery out of the State, $800,000.

The tax in this case, under section 72, is on the capital stock $1,000,000 (assuming it to be selling at par), less the non-taxable securities and property out of the State, amounting to $900,000, or $100,000. The tax on this is $1,600.

The maximum in this case would be 120 per cent. of the real estate, machinery, merchandise and taxable securities amounting to $900,000, or $1,080,000 less the real estate, machinery and non-taxable securities amounting to $900,000, or $180,000, which is more than the amount on which the straight tax is levied. Therefore, the maximum does not apply.

The minimum tax in this case would be $1,000; this is less than the straight tax, therefore it does not apply.

h. — Examples of the maximum.

(1) Suppose a corporation with a capital of $500,000, owning real estate, $100,000; machinery, $100,000; merchandise, $100,000; taxable securities, $50,000; non-taxable securities, $50,000, and taxable property out of the State, $50,000.

If there were no maximum provision, the tax would be on the capital stock, $500,000 (assuming it to be selling at par), less the real estate, machinery and non-taxable securities and the property situated out of the State, amounting in all to $300,000; leaving $200,000 as the amount upon which the franchise tax of (usually about) $16 per thousand would be levied; the total tax being $3,200.

But under the maximum provision the tax is upon 120 per cent. of the value of the real estate, machinery, merchandise and taxable securities (amounting to $350,000), or $420,000; less the deductions specified above, amounting to $300,000; leaving $120,000 as the maximum amount on which the tax can be levied. This being less than $200,000, the maximum applies, and the tax in this case would be only $1,920.

(2) Suppose a corporation with a capital of $250,000, and $100,000 in real estate and machinery. In this case, if there were no maximum, the tax would be upon $150,000, the excess of the capital stock over the value of the real estate and machinery. But the maximum amount taxable is 120 per cent. of the value of the real estate and machinery, less the value of the real estate and machinery, or $20,000, so that the tax in this case would be only $320.

i. — Examples of the minimum.

(1) Suppose a corporation having a capital of $100,000, with property amounting to $97,000 outside of the State, and the balance in non-taxable securities, $3,000. Here there would be no straight tax at all. But the minimum applies, and there being no local tax, the franchise tax is $100.

(2) Suppose the last case to be varied so that the corporation has property outside the State of $95,000; non-taxable securities, $2,000, and taxable securities, $3,000. Then the straight tax would be on $100,000 less ($95,000 + $2,000), or $3,000, and the tax would be $48. But minimum franchise tax is $100, so that here the minimum applies.

(3) In the rare case where the maximum and the minimum both apply and the minimum is larger than the maximum, the board of appeal has decided that the minimum governs. Such a case would be where the stock of a corporation owning valuable patents and good-will had a high market value, and the corporation had only a small amount of real estate and machinery. For example, if the market value of the stock were $250,000, and the value of the real estate and machinery were $10,000, the maximum tax would be on $2,000, or $32. The minimum tax would be $250 less $160, or $90.

j. — Examples where there is no franchise tax at all.

Suppose a holding corporation having no property except the non-taxable stock of other Massachusetts corporations, a small amount of real estate and machinery and taxable property out of Massachusetts other than real estate, machinery and merchandise. Suppose the various amounts to be as follows:

Capital, $100,000; real estate, $7,000; non-taxable securities, $90,000; property out of State, $3,000.

Here the straight tax would be on $100,000 — (7,000 + 90,000 + 3,000), or nothing. The maximum naturally would not apply. The minimum tax would be $100, less the local tax on the real estate, or $112, and therefore would not apply.

§ 75, Taxation of foreign corporations — a. Excise tax.

"Every foreign corporation of the classes described in section fifty-eight shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one hundredth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the commonwealth during the preceding year, and the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars." [2030]

It is also provided by statute that: "Assessors shall annually, on or before the first Monday of August . . . return to the tax commissioner the names of all foreign corporations which have a usual place of business within [each] city or town." [2031]

Prior to the act of 1903, there was no exercise tax on the capital stock of foreign corporations. This tax is for the commodity or privilege of having a place of business in the State,[2032] and is constitutional.[2033]

After May 1, 1908, this section will read as follows:

"Every foreign corporation of the classes described in section fifty-eight shall, in each year, at the time of filing its annual

[2030] St. 1903, c. 437, § 75. Citations. — American Can Co. v. Com., 188 Mass. 2, 3; Atty.-Gen. v. Electric Storage Battery Co., 188 Mass. 239.

[2031] St. 1904, c. 181, amending R. L., c. 12, § 93, and in effect Apr. 25, 1904.

[2032] Atty.-Gen. v. Electric Storage Battery Co., 188 Mass. 239.

[2033] Commonwealth v. Lancaster Savings Bank, 123 Mass. 493; Atty.-Gen. v. Bay State Mining Co., 99 Mass. 148; Portland Bank v. Apthorp, 12 Mass. 252; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; Maine v Western Union Telegraph Co., 73 Me. 518.

certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars." [2034]

In other words, the tax is to be raised from one-hundredth of one per cent. to one-fiftieth, and the deduction of the local tax is abolished. This will go far to abolish a certain taxation advantage in incorporating in Maine and New Jersey in the case of small corporations.

b. — Corporations liable to the tax.

The classes of foreign corporations described in § 58 include every one " which has a usual place of business in this Commonwealth, or which is engaged in this Commonwealth, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind."

This section does not apply to corporations which are engaged within the Commonwealth solely in interstate commerce.[2035] Thus, it does not apply to a foreign express company receiving no goods for delivery in Massachusetts.[2036] But it does apply to corporations having an office here and engaged in both interstate and local business.[2037]

c. — Application of the maximum.

When the percentage exceeds the sum of $2,000, the amount of the local tax is to be deducted (until May 1, 1908) from the whole amount of the tax before it is reduced to $2,000.[2038]

[2034] St. 1907, c. 578, §§ 1, 2.

[2035] Atty.-Gen. v. Electric Storage Battery Co., 188 Mass. 239, 240; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Norfolk & Western R. R. v. Pennsylvania, 136 U. S. 114.

[2036] 2 Op. Atty.-Gen. 493. Cf. Leloup v. Mobile, 127 U. S. 640.

[2037] Atty.-Gen. v. Electric Storage Battery Co., 188 Mass. 239, 241; Pennsylvania Railroad v. Knight, 192 U. S. 21; Pullman Co. v. Adams, 189 U. S. 420.

[2038] American Can Co. v. Com., 188 Mass. 1.

d. Local tax.

Under § 71 of the act, foreign corporations are taxable on their real estate, machinery and merchandise in the cities or towns in which such property is situated.

The personal property of foreign corporations has been taxed even when that of domestic corporations was not,[2039] and the word "merchandise" in section 71 is synonymous with tangible property which could be sold.[2040] It has been held that an office where business is carried on, and where furniture and fixtures are kept is a "shop" within the statutes as to taxation.[2041]

The following have been held subject to taxation as personal property: [2042] (1) Office furniture and fixtures; [2043] (2) property pledged to the corporation, which carries on a loan business; [2044] sewing machines kept in the store of the corporation for sale or lease; [2045] (3) lanterns used by a corporation under a contract for lighting a city; [2046] (4) cash carriers leased for profit to stores.[2047]

On the other hand, a foreign corporation is not taxable on money deposited in national banks within the Commonwealth; [2048] nor on debts due to the corporation.[2049]

The pipes and water mains of a water company, in private land, are not "machinery" within R. L., c. 12, § 23, cl. 2, so as to be taxable where they are situated.[2050]

The local tax is properly assessed to the foreign corporation and not in rem against the particular property taxed.[2051]

[2039] Blackstone Mfg. Co. v. Blackstone, 13 Gray, 488; Boston Loan Co. v. Boston, 137 Mass. 332.

[2040] N. E., etc., S. S. Co. v. Commonwealth, 81 N. E. 286.

[2041] Boston Loan Co. v. Boston, 137 Mass. 332.

[2042] See R. L., c. 12, § 23.

[2043] Boston Loan Co. v. Boston, 137 Mass. 332.

[2044] Boston Loan Co. v. Boston, 137 Mass. 332, 335.

[2045] Singer Manuf. Co. v. County Commissioners, 139 Mass. 266.

[2046] Rising Sun, etc., Co. v. Boston, 181 Mass. 211.

[2047] Lamson Consolidated, etc., Co. v. Boston, 170 Mass. 354. Cf. R. L., c. 12, § 23, cl. 2.

[2048] Boston Investment Co. v. Boston, 158 Mass. 461.

[2049] New York Biscuit Co. v. Cambridge, 161 Mass. 326.

[2050] Coffin v. Artesian Water Co., 193 Mass. 274. Cf. Dudley v. Jamaica, Pond Aqueduct Co., 100 Mass. 183.

[2051] Scollard v. American Felt Co., 194 Mass. 127.

e. — Collection of tax.

"When any foreign corporation . . . doing business in the commonwealth shall for sixty days neglect, refuse or omit to pay a tax lawfully assessed and payable, any court having jurisdiction in equity may upon petition of the collector of taxes of the city or town where the tax is assessed restrain said corporation . . . from doing business in the commonwealth, until said tax, with all incidental costs and charges, shall have been paid. Service of process upon any such petition may be made by an officer duly qualified to serve process by leaving a duly attested copy thereof at the place where the business is carried on." [2052]

The service prescribed by this act is valid and sufficient, and the act is not in this respect repealed by St. 1903, c. 437.[2053]

§ 76. Remedy where the assessors' valuation exceeds that of the tax commissioner.

"If the value of the real estate and machinery of a domestic corporation which is subject to local taxation within the commonwealth, as determined by the tax commissioner, is less than the value thereof as determined by the assessors of the city or town in which it is situated, he shall give notice of his determination to such corporation; and, unless within one month after the date of such notice it applies to said assessors for an abatement and, upon their refusal to grant an abatement, prosecutes an appeal under the provisions of section seventy-seven of chapter twelve of the Revised Laws, giving notice thereof to the tax commissioner, the valuation of said commissioner shall be conclusive upon said corporation." [2054]

As to applications to the assessors for abatements and the provisions of statute governing appeals, see supra, § 73.

[2052] St. 1902, c. 349. Cited in Scollard v. American Felt Co., 194 Mass. 127.

[2053] Scollard v. American Felt Co., 194 Mass. 127.

[2054] St. 1903, c. 437, § 76; R. L., c. 14, § 42; St. 1898, c. 417; Pub. St., c. 13, § 41; St. 1865, c. 283, § 6.

Citations. — R. L., c. 14, § 42: Hamilton Mfg. Co. v. Lowell, 185 Mass. 117.

Pub. St., c. 13, § 41: Firemen's Ins. Co. v. Commonwealth, 137 Mass. 81; Lowell v. County Com'rs, 146 Mass. 408, 16 N. E. Rep. 8; Lowell v. County Com'rs, 152 Mass. 374, 25 N. E. Rep. 469; Troy Cotton, etc., Mfy. v. Fall River, 167 Mass. 522, 46 N. E. Rep. 99.

This section is substantially the same as in the Revised Laws.

It will be noted that this section mentions an appeal only under R. L., c. 12, § 77, which is to the County Commissioners, and does not refer to R. L., c. 12, § 78, providing for an appeal in alternative to the Superior Court, although § 73 of the present act makes the decision of *either* the commissioners or the court conclusive. Query, whether, taking all these provisions together, an appeal to the court would not be held a compliance with the terms of this section.

§ 77. Notice of tax.

"The tax commissioner shall, annually, as soon as may be after the first Monday of August, give notice to the treasurer of every domestic corporation which is liable to a tax under the provisions of section seventy-four of the amount thereof, that it will be due and payable to the treasurer and receiver general within thirty days after the date of such notice, but not before the twentieth day of October; and that, within ten days after the date of such notice, the corporation may apply for a correction of said tax and be heard thereon by the board of appeal authorized by the provisions of section sixty-five of chapter fourteen of the Revised Laws." [2055]

a. Board of appeal.

The board of appeal above referred to consists of the treasurer and receiver-general, the auditor of accounts and a member of the council to be designated by the governor. It is provided that "said board shall hear and decide the subject-matter of such appeal, and give notice of the decision to the tax commissioner and the appellant; and its decision shall be final and conclusive, although payments have been made as required by the decision appealed from. Any overpayment of tax determined by decision of said board of appeal shall be reimbursed

[2055] St. 1906, c. 271, § 3; St. 1903, c. 437, § 77; R. L., c. 14, § 54; St. 1898, c. 417; St. 1888, c. 413, § 23; St. 1887, c. 413, § 23; St. 1887, c. 283, § 1; Pub. St., c. 13, §§ 26, 53; St. 1880, c. 227, § 2; St. 1865, c. 283, § 11.

Citations. — St. 1888, c. 413, § 23: Nash v. Brown, 165 Mass. 384, 43 N. E. Rep. 180.

Pub. St., c. 13, § 53: 1 Op. Atty.-Gen. 571. See also Pratt v. Street Commissioners, 139 Mass. 562, 2 N. E. Rep. 675.

This section is substantially the same as in the Revised Laws.

from the treasury of the Commonwealth.[2056] See further as to the board of appeal, infra, § 82, a, b.

§ 78. Collection of tax.

"Taxes which are assessed under the provisions of this act may be recovered by the treasurer and receiver general in an action of contract brought in the name of the commonweatlh, or they may be collected by an information brought in the supreme judicial court by the attorney-general at the relation of the treasurer and receiver general. The court may issue an injunction upon such information restraining the further prosecution of the business of such corporation until such taxes with interest and costs thereon have been paid." [2057]

The provision that actions of contract shall be brought in the name of the Commonwealth is declaratory of the earlier law, and an action in the name of the treasurer and receiver-general will not lie.[2058]

§ 79. Interest on unpaid taxes.

"Corporations which neglect to pay the taxes assessed under the provisions of this act shall pay interest at the rate of six per cent per annum from the time when such taxes were payable until such payment is made, if such payment is made before the

[2056] R. L., c. 14, § 65; St. 1898, c. 417; Pub. St., c. 13, §§ 61, 62; St. 1880, c. 227, § 2; St. 1877, c. 164; St. 1865, c. 283, § 13; Boston Mfg. Co. v. Commonwealth, 144 Mass. 598, 12 N. E. Rep. 362.

[2057] St. 1903, c. 437, § 78; R. L., c. 14, § 58; St. 1900, c. 398; St. 1898, c. 417; Pub. St., c. 13, §§ 22, 28, 36, 54; St. 1880, c. 227, § 4; St. 1878, c. 218, § 3; St. 1873, c. 141, § 10; St. 1865, c. 283, § 14; St. 1862, c. 224, § 11.

Citations. — St. 1903, c. 437, § 78: Atty.-Gen. v. Electric Storage Battery Co., 188 Mass. 239.

St. 1865, c. 283, § 14: Atty.-Gen. v. Bay State Mining Co., 99 Mass. 148.

St. 1862, c. 224, § 11: Com. v. Lancaster Savings Bank, 123 Mass. 496; Edwards v. Warren Linoline, etc., Works, 168 Mass. 567, 47 N. E. Rep. 502.

See also, generally, W. U. Tel. Co. v. Massachusetts, 125 U. S. 530; Oliver v. Colonial Gold Co., 11 Allen, 284.

[2058] Oliver v. Colonial Gold Company, 11 Allen, 283; Gray v. Paxton, Quincy, 541.

commencement of proceedings for the recovery thereof, and twelve per cent if made after the commencement thereof." [2059]

§ 80. Liability of lessee for tax.

"The lessee of the real estate or machinery of any corporation which is liable to taxation under the provisions of this act shall also be liable for the payment of the tax, and upon such payment may, in the absence of an agreement to the contrary, retain it out of the rent of the property or recover it in an action against the lessor." [2060]

§ 81. Submission of books to inspection.

"Every domestic corporation which is subject to taxation under the provisions of this act shall, when required, submit its books to the inspection of the tax commissioner and its treasurer and directors to examination on oath relative to all matters affecting the determinations which are to be made by said commissioner." [2061]

This provision "does not imply an investigation and valuation of their property, unless such investigation becomes necessary by reason of the absence of other means of information by which to determine the value of the stock. It sometimes occurs that all the shares of a corporation are held in a few hands, and so controlled that no sales take place, and no means of ascertaining the market value of the shares can be reached. In such cases an inspection of the books showing the amount and kind of investments, the nature and extent of the business, and the amount of profits realized, would afford the means of a reasonable approximation to the values of the shares of the corporate stock." [2062]

[2059] St. 1903, c. 437, § 79; R. L., c. 14, § 56; St. 1901, c. 222; St. 1900, c. 398. Not cited to 193 Mass.

This section is substantially the same as in the Revised Laws.

[2060] St. 1903, c. 437, § 80; R. L., c. 14, § 60; St. 1898, c. 417; Pub. St., c. 13, § 56; St. 1865, c. 283, § 16. Not cited to 193 Mass.

[2061] St. 1903, c. 437, § 81; R. L., c. 14, § 63; St. 1898, c. 417; St. 1888, c. 413, § 23; St. 1887, c. 283, § 1; St. 1886, c. 270; Pub. St., c. 13, §§ 26, 59; St. 1880, c. 227, § 2; St. 1865, c. 283, § 17; St. 1864, c. 208, § 16. No material citations to 193 Mass. See Commonwealth v. Cary Improvement Co., 98 Mass. 19.

[2062] Com. v. Cary Improvement Co., 98 Mass. 19, 22, per Wells, J.

§ 82. Appeals and reimbursements.

"Any party who is aggrieved by a decision of the tax commissioner upon any question arising under the provisions of sections seventy-two, seventy-four and eighty-seven may, within ten days after notice of his decision, apply to the board of appeal authorized by section sixty-five of chapter fourteen of the Revised Laws. Said board shall hear and decide the subject matter of said appeal and give notice of its decision to the tax commissioner and to the appellant; and its decision shall be final and conclusive, although payments have been made as required by the decision appealed from. Any over-payment of tax determined by decision of said board of appeal shall be reimbursed from the treasury of the commonwealth." [2063]

a. Board of appeal.

As to the constitution and functions of the board of appeal, see supra, § 77, *a*.

A petition to the courts cannot be maintained to recover a tax paid on what is alleged to be an overvaluation of the shares. The board of appeal is the last resort in matters of valuation, although the question whether property was taxed which should not have been taxed is open.[2064]

b. Who may appeal.

The interest of the cities and towns which are ultimately to receive the distributive shares of the tax, are represented by the tax commission, and are not "parties aggrieved" so as to be entitled to an appeal.[2065]

§ 83. Collection of tax by warrant.

"If a tax or excise of any kind remains due to or is claimed by the commonwealth from any domestic corporation which is subject to the provisions of this act for ten days after notice given

[2063] St. 1903, c. 437, § 82; R. L., c. 14, § 65; St. 1898, c. 417; Pub. St., c. 13, §§ 61, 62; St. 1880, c. 227, § 2; St. 1877, c. 164; St. 1865, c. 283, § 13.

Citations. — Pub. St., c. 13, § 62; Boston Mfg. Co. v. Com., 144 Mass. 598, 12 N. E. Rep. 362.

[2064] Boston Mfg. Co. v. Com., 144 Mass. 598. 12 N. E. Rep. 362.

[2065] 2 Op. Atty.-Gen. 628.

through the mail by the treasurer and receiver general to its treasurer or other financial agent that such tax or excise is due and unpaid, the treasurer and receiver general, in addition to other methods of relief, may issue his warrant, directed to the sheriff or his deputies of the county in which the principal office of the corporation is located, commanding the collection of such tax or excise. Such warrant may be substantially in the form of and served in the same manner as those issued by assessors of towns. It shall not run against the body of any person, but no property of such delinquent corporation shall be exempt from seizure and sale thereon. The officer having such warrant shall collect such tax or excise and interest thereon at the rate of twelve per cent per annum from the time when such tax or excise became due, and may collect and receive for his fees the sum which an officer would be entitled by law to receive upon an execution for a like amount. He shall also collect one dollar for the warrant which shall be paid over to the treasurer and receiver general." [2066]

§ 84. Determination of validity of tax.

"A corporation which is aggrieved by the exaction of such tax or excise, or of any portion thereof may, within six months after its payment, whether such payment be before or after the issue of the warrant mentioned in the preceding section, apply by petition to the supreme judicial court setting forth the amount of the tax or excise and costs thereon which have been paid, the general legal grounds and the specific grounds in fact, if any, upon which it alleges that such tax or excise should not have been exacted. Said petition shall be the exclusive remedy and shall be entered and determined in the county of Suffolk. A copy of the petition shall be served upon the treasurer and receiver general and upon the attorney-general, and the proceedings thereon shall conform as nearly as may be to proceedings in equity, and an abatement shall be made of such portion of the tax or excise as was assessed without authority of law." [2067]

[2066] St. 1903, c. 437, § 83; R. L., c. 14, § 66; St. 1901, c. 222; St. 1900, c. 398; St. 1898, c. 417; Pub. St., c. 13, §§ 63, 66; St. 1881, c. 155; St. 1867, c. 52, §§ 1, 4. Not cited to 193 Mass. See Com. v. Lancaster Savings Bank, 123 Mass. 497.

This section is substantially the same as in the Revised Laws.

[2067] St. 1903, c. 437, § 84; R. L., c. 14, § 67; St. 1898, c. 417; Pub. St., c. 13, §§ 64, 66; St. 1881, c. 155; St. 1867, c. 52, §§ 2, 4.

No petition will lie to recover the amount of a tax on account of alleged overvaluation of capital stock. The board of appeal provided by section 82 of the present act is the final resort on the question of value.[2068]

§ 85. Reimbursement of tax illegally exacted.

"If the court, upon a hearing, adjudges that such tax or excise and the costs thereon have been illegally exacted, a copy of the judgment or decree shall be transmitted by the clerk of the court to the auditor of the commonwealth, who shall thereupon audit and certify the amount adjudged to have been illegally exacted, with interest, and with costs to be taxed by the clerk of the court in the same manner as other claims against the commonwealth, and the treasurer and receiver general shall pay the same without any further act or resolve making appropriation therefor. So much thereof as may have been paid from the treasury of the commonwealth to any city or town may be deducted from and set off against any sum afterward payable to such city or town." [2069]

§ 86. Distribution of tax.

"No taxes shall be assessed in a city or town for state, county or town purposes upon the shares in the capital stock of domestic corporations for any year for which they pay to the treasurer and receiver general a tax on the value of their corporate franchises. Such proportion of the tax collected of each of said corporations

Citations. — St. 1903, c. 437, § 84: Mexican Central R. Co. v. Commonwealth, 192 Mass. 129; American Glue Co. v. Commonwealth, 81 N. E. 302; New England, etc., Steamship Co. v. Commonwealth, 81 N. E. 286.

Pub. St., c. 13, § 64: Firemen's Ins. Co. v. Commonwealth, 137 Mass. 80; Milford v. Commonwealth, 144 Mass. 66, 10 N. E. Rep. 516; Boston Mfg. Co. v. Commonwealth, 144 Mass. 598, 12 N. E. Rep. 362; Suffolk Savings Bank, Pet'r, 149 Mass. 3, 20 N. E. Rep. 331.

St. 1867, c. 52, § 2: Manufacturers' Ins. Co. v. Loud, 99 Mass. 146.

See also, generally, Commonwealth v. Lancaster Savings Bank, 123 Mass. 497; Boston, etc., Railroad v. Commonwealth, 157 Mass. 68, 31 N. E. Rep. 690.

This section is the same as in the Revised Laws.

[2068] See supra, § 82, and § 77, *a*.

[2069] St. 1903, c. 437, § 85; R. L., c. 14, § 68; St. 1898, c. 417; Pub. St., c. 13, § 65; St. 1881, c. 155; St. 1867, c. 52, § 3. Not cited to 193 Mass.

This section is the same as in the Revised Laws.

as corresponds to the proportion of its stock owned by persons residing in this commonwealth shall be distributed, credited and paid to the several cities and towns in which, from the returns or other evidence, it appears that such persons resided on the preceding first day of May, according to the number of shares so held in such cities and towns respectively. If stock is held by copartners, guardians, executors, administrators or trustees, the proportion of tax corresponding to the amount of stock so held shall be credited and paid to the cities and towns where the stock would have been taxed under the provisions of clauses four, five, six and seven of section twenty-three and section twenty-seven of chapter twelve of the Revised Laws." [2070]

a. Shares not taxable locally.

The franchise tax is a substitute for the local taxation of corporate shares.[2071]

Shares of a domestic corporation, purchased by such corporation and held for its benefit by a trustee, are not taxable either to the corporation or the trustee; and the municipality in which the trustee resides is not entitled to be paid by the Commonwealth any part of the franchise tax corresponding to such stock.[2072]

b. Taxation of stock held by partners, executors, etc.

The provisions of the Revised Laws above referred to are as follows:

"All personal estate, within or without the commonwealth, shall be assessed to the owner in the city or town in which he is an inhabitant on the first day of May, except as provided in chapter fourteen and in the following clauses of this section: —" [2073]

[2070] St. 1903, c. 437, § 86; R. L., c. 14, § 61; St. 1901, c. 413, § 4; St. 1900, c. 413, § 5; St. 1898, c. 417; c. 578, §§ 4, 26; St. 1888, c. 413, § 23; St. 1887, c. 228; Pub. St., c. 13, § 57; St. 1866, c. 291, § 2; St. 1865, c. 283, § 15; St. 1864, c. 208, §§ 8, 15. No material citations to 193 Mass., but see as to Pub. St., c. 13, § 57, 1 Op. Atty.-Gen. 571; Worcester v. Board of Appeal, 184 Mass. 460.

[2071] Formerly shares of corporations formed to build railroads in other countries were taxable to the owners, and the corporation was also liable to an excise tax. Pratt v. Boston, 139 Mass. 559. Cf. R. L., c. 14, § 52.

[2072] Worcester v. Board of Appeal, 184 Mass. 460.

[2073] R. L., c. 12, § 23; Pub. St., c. 11, § 20; Gen. St., c. 11, § 12; St. 1839, c. 139, § 2; Rev. St., c. 7, §§ 9, 10; St. 1830, c. 151, § 2; Thorndike

(4) "Personal property belonging to persons under guardianship shall be assessed to the guardian in the city or town of which the ward is an inhabitant unless the ward resides and has his home without the commonwealth, in which case it shall be taxed to the guardian in the city or town of which he is an inhabitant." [2074]

(5) "Personal property held in trust by an executor, administrator or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the commonwealth; and if he resides out of the commonwealth it shall be assessed in the place where the executor, administrator or trustee resides; and if there are two or more executors, administrators or trustees residing in different places, the property shall be assessed to them in equal portions in such places, and the tax thereon shall be paid out of said income. If the executor, administrator or trustee is not an inhabitant of the commonwealth, it shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to an executor, administrator or trustee under a testamentary trust in any other State." [2075]

(6) "Personal property placed in the hands of a corporation or individual as an accumulating fund for the future benefit of heirs or other persons shall be assessed to such heirs or persons, if within the commonwealth, otherwise to the person so placing it, or his executors or administrators, until a trustee is appointed to take charge of such property or of the income thereof." [2076]

v. Boston, 1 Met. 242; Sears v. Boston, 1 Met. 250; Worcester v. Board of Appeal, 184 Mass. 464; Prince v. Boston, 193 Mass. 545; Coffin v. Artesian Water Co., 193 Mass. 274.

[2074] R. L., c. 12, § 23, cl. 4; Pub. St., c. 11, § 20, cl. 4; Gen. St., c. 11, § 12, cl. 4; St. 1859, c. 258; St. 1855, c. 106; Rev. St., c. 7, § 10, cl. 4; Bourne v. Boston, 2 Gray, 494; Kirkland v. Whately, 4 Allen, 462; Skinner v. Flint, 105 Mass. 528; Northampton v. County Com'rs, 145 Mass. 108, 111, 13 N. E. Rep. 388.

[2075] R. L., c. 12, § 23, cl. 5; St. 1894, c. 490; Pub. St., c. 11, § 20, cl. 5; Gen. St., c. 11, § 12, cl. 5; Rev. St., c. 7, § 10, cl. 5; Bates v. Boston, 5 Cush. 93; Dorr v. Boston, 6 Gray, 131, 132; Hardy v. Yarmouth, 6 Allen, 277; Skinner v. Flint, 105 Mass. 528; Davis v. Macy, 124 Mass. 193, 194; Ricker v. Am. Loan & Trust Co., 140 Mass. 346, 5 N. E. Rep. 284; Northampton v. County Com'rs, 145 Mass. 108, 111, 13 N. E. Rep. 388; Williston Seminary v. County Com'rs, 147 Mass. 427, 431, 18 N. E. Rep. 210; Hunt v. Perry, 165 Mass. 287, 43 N. E. Rep. 103; Worcester v. Board of Appeal, 184 Mass. 464; Prince v. Boston, 193 Mass. 545; Coffin v. Artesian Water Co., 193 Mass. 274.

[2076] R. L., c. 12, § 23, cl. 6; Pub. St., c. 11, § 20, cl. 6; Gen. St., c. 11, § 12, cl. 6; Rev. St., c. 7, § 10, cl. 6; Hathaway v. Fish, 13 Allen, 267; Macy v. Nantucket, 121 Mass. 351; Freetown v. Fish, 123 Mass. 355; Davis v. Macy, 124 Mass. 193; Williston Seminary v. County Com'rs, 147 Mass. 427, 18 N. E. Rep. 210.

(7) "Personal property of deceased persons shall be assessed in the city or town in which the deceased last dwelt. Before the appointment of an executor or administrator it shall be assessed in general terms to the estate of the deceased, and the executor or administrator subsequently appointed shall be liable for the tax so assessed as though assessed to him. After such appointment it shall be assessed to such executor or administrator for three years, or until it has been distributed and a notice of such distribution has been given to the assessors stating the name and residence of the several parties interested in the estate who are inhabitants of the commonwealth and the amount paid to each. After three years from the date of such appointment it shall be assessed according to the provisions of clause five of this section." [2077]

"Partners, whether residing in the same or in different cities or towns, may be jointly taxed under their firm name, in the place where their business is carried on, for all the personal property employed in such business, except ships or vessels. If partners have places of business in two or more towns, they shall be taxed in each of such places for the proportion of property employed therein. If so jointly taxed, each partner shall be liable for the whole tax." [2078]

§ 87. Determination and payment of tax.

"The tax commissioner shall, subject to appeal to the board of appeal authorized by section sixty-five of chapter fourteen of the Revised Laws, ascertain and determine the amount due to each city and town under the provisions of the preceding section, notify the treasurer of each city and town thereof, and certify

[2077] R. L., c. 12, § 23, cl. 7; Pub. St., c. 11, § 20, cl. 7; St. 1878, c. 189, § 2; Gen. St., c. 11, § 12, cl. 7; St. 1852, c. 234; St. 1848, c. 235; Rev. St., c. 7, § 10, cl. 7; Cook v. Leland, 5 Pick. 236; Smith v. Northampton Bank, 4 Cush. 1; Hardy v. Yarmouth, 6 Allen, 277; Wood v. Torrey, 97 Mass. 321, 322; Carleton v. Ashburnham, 102 Mass. 348; Revere v. Boston, 123 Mass. 375, 376; Dallinger v. Davis, 149 Mass. 62, 63, 20 N. E. Rep. 696; Vaughan v. Boston, 154 Mass. 143, 28 N. E. Rep. 144; Cotton v. Boston, 161 Mass. 8, 9, 36 N. E. Rep. 677; Dallinger v. Richardson, 176 Mass. 77, 57 N. E. Rep. 224.

[2078] R. L., c. 12, § 27; Pub. St., c. 11, § 24; Gen. St., c. 11, § 15; St. 1859, c. 114; Rev. St., c. 7, § 13; Little v. Cambridge, 9 Cush. 298; Howard v. Proctor, 7 Gray, 128, 132; Bemis v. Boston, 14 Allen, 366; Hoadley v. County Com'rs, 105 Mass. 519, 526; Palmer v. Kelleher, 111 Mass. 322; Stinson v. Boston, 125 Mass. 348, 351; Oliver v. Lynn, 130 Mass. 143, 144; Washburn v. Walworth, 133 Mass. 499; Barker v. Watertown, 137 Mass. 227; Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. Rep. 284; Cloutman v. Concord, 163 Mass. 444, 40 N. E. Rep. 763; Duxbury v. County Com'rs, 172 Mass. 383, 52 N. E. Rep. 535; Spinney v. Lynn, 172 Mass. 464, 52 N. E. Rep. 523.

the amount as finally determined to the treasurer and receiver general, who shall thereupon pay over the same." [2079]

L. ORGANIZATION AND FILING FEES.

§ 88. Fees for organization papers.

"The fee for filing and recording the articles of organization required by section eleven, including the issuing by the secretary of the commonwealth of the certificate of incorporation, shall be one twentieth of one per cent of the total amount of the authorized capital stock as fixed by the articles of organization; but not in any case less than twenty-five dollars." [2080]

For a corporation with a capital stock of $50,000, the organization fees are $25.00; for one of $500,000, the fees are $250.00.[2081]

§ 89. Fees for increase of capital.

"The fee for filing and recording the certificate required by section forty-two providing for an increase of capital stock shall be one twentieth of one per cent of the amount by which the capital is increased." [2082]

[2079] St. 1903, c. 437, § 87; R. L., c. 14, § 62; St. 1898, c. 578, §§ 4, 5; Pub. St., c. 13, § 58; St. 1865, c. 283, § 15.

Citations. — Pub. St., c. 13, § 58: 1 Op. Atty.-Gen. 571.

[2080] St. 1907, c. 396, § 1; St. 1903, c. 437, § 88; R. L., c. 110, § 86; St. 1871, c. 356; St. 1870, c. 224, § 59; St. 1865, c. 76; St. 1863, 231, § 2; St. 1896, c. 369; St. 1887, c. 225; Pub. St., c. 106, § 84.

Citations. — St. 1896, c. 369: Steel v. Webster, 188 Mass. 479.

St. 1887, c. 225: Steel v. Webster, 188 Mass. 479.

[2081] *Historical.* Under the Revised Laws the fees for filing and recording a certificate of organization were one-twentieth of one per cent. of the amount of capital stock, with a minimum of $5 and a maximum of $200.

When the capital exceeds $800,000 the fees are more under the new act than under the old law; under $800,000 they are less, except for very small corporations.

[2082] St. 1907, c. 396, § 2; St. 1903, c. 437, § 89; R. L., c. 110, § 86; St. 1896, c. 523, § 2; Pub. St., c. 106, § 84, cl. 3; St. 1871, c. 356; St. 1865, c. 76; St. 1863, c. 231, § 2.

Citations. — Pub. St., c. 106, § 84, cl. 3: 1 Op. Atty.-Gen. 205.

Historical. Under the Revised Laws the fee was one-twentieth of one per cent. of the increase, with a provision that this fee, together with fees previously paid for organization and any subsequent increase, should not exceed $200. After $200 had been paid the fee was $1. See 1 Op. Atty.-Gen. 300.

§ 90. Fees for all other certificates and reports.

"The fees for filing all other certificates, statements or reports required by law shall be five dollars for each certificate, statement or report, but no fee shall be paid for filing the annual tax return required by section forty-eight.

"Fees for official copies of any of the records referred to in this act shall be at the rates now fixed by chapter two hundred and four of the Revised Laws for copies of similar records furnished by the secretary of the commonwealth." [2083]

§ 91. Fees for foreign corporations.

"Every foreign corporation which is subject to the provisions of this act shall pay to the officers hereinafter designated the following fees: for filing a copy of its charter, by-laws and the certificate required by section sixty, twenty-five dollars to the treasurer and receiver general.

"For filing all other certificates and statements, including the annual certificate of condition required by section sixty-six, five dollars to the secretary of the commonwealth." [2084]

The fee for certificates of increase of capital is $5. There are no fees for filing amendments to the charter or by-laws.

M. MISCELLANEOUS PROVISIONS.

§ 92. Fishing associations.

"A corporation which is organized for the purpose of opening outlets, canals, sluiceways or ditches for the introduction and propagation of herrings and alewives, before making any purchase of real estate or doing any acts in pursuance of its organization, shall obtain the authority in writing of the mayor and alder-

[2083] St. 1903, c. 437, § 90; R. L., c. 110, § 86; St. 1895, c. 169; Pub. St., c. 106, § 84; St. 1879, c. 202, § 2; St. 1875, c. 177, § 4; St. 1870, c. 224, § 59; St. 1896, c. 523, § 1.

Historical. The last clause is the same as in the Revised Laws.

Formerly there was a fee of five dollars for filing and recording the annual certificate of condition. In general, the fee for filing and recording other certificates was one dollar.

[2084] St. 1903, c. 437, § 91; R. L., c. 126, § 20; St. 1900, c. 280; St. 1895, c. 157; St. 1891, c. 341, § 6; St. 1884, c. 330, § 3; St. 1882, c. 106, §§ 3, 5.

Historical. Formerly the fees under the first clause of this section were fifteen dollars.

men of the city or of the selectmen of the town within which its works are to be located, and, within thirty days after obtaining such authority, shall file a copy thereof, certified by the city or town clerk, in the office of the secrtary of the commonwealth." [2085]

§ 93. Co-operative associations.

"A corporation which is organized for the purpose of co-operation in carrying on any business and of co-operative trade shall distribute its earnings or profits among its workmen, purchasers and stockholders at such times and in such manner as its by-laws shall prescribe, but as often at least as once in twelve months. No distribution shall be made unless at least ten per cent of the net profits have been appropriated for a contingent or sinking fund until an amount has accumulated equal to thirty per cent of its capital stock. No person shall hold shares in any such corporation to an amount exceeding one thousand dollars at their par value, nor shall a stockholder be entitled to more than one vote upon any subject." [2086]

A co-operative bank is chargeable in trustee process as the trustee of a member at the withdrawal value of his shares, although he has given no notice of a desire to withdraw his shares.[2087] Query, whether such shares can be attached in the ordinary way.[2088]

The provision as to distribution created no liability of offi-

[2085] St. 1903, c. 437, § 92; R. L., c. 110, §§ 8, 56, 71; Pub. St., c. 106, § 10; St. 1870, c. 224, § 4; St. 1866, c. 187, § 1; Pub. St., c. 106, § 58; St. 1870, c. 224, § 36; Pub. St., c. 106, § 74; St. 1870, c. 224, § 54.

Citations. — St. 1866, c. 187, § 1: See Swift v. Falmouth, 167 Mass. 122, 45 N. E. Rep. 184.

St. 1870, c. 224, § 36: Nickerson v. Wheeler, 118 Mass. 299.

These provisions are similar to those in the Revised Laws, except that the maximum limitation of capital is removed.

[2086] St. 1903, c. 437, § 93; R. L., c. 110, §§ 7, 69, 70; Pub. St., c. 106, § 9; St. 1879, c. 210; St. 1870, c. 224, § 3; St. 1866, c. 290, §§ 1, 5; Pub. St., c. 106, §§ 72, 73; St. 1870, c. 224, §§ 51, 52; St. 1866, c. 290, §§ 7, 12.

Citations. — R. L., c. 110, § 69: Ellis v. French Canadian, etc., Assoc., 189 Mass. 566.

Pub. St., c. 106, §§ 72, 73: Lindsay v. Arlington Co-operative Assoc., 186 Mass. 371.

St. 1866, c. 290, §§ 1, 5: Ward v. Brigham, 127 Mass. 24.

[2087] Atwood v. Dumas, 149 Mass. 167.

[2088] Ibid. Cf. supra, § 28, *f* (10).

cers to creditors, in case of its violation, at least in the absence of fraud.[2089]

§ 94. Free beds in hospitals.

"A manufacturing corporation may, by the vote of a majority of all its stock, or if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, appropriate not more than five thousand dollars, or an annual sum of not more than five hundred dollars, for the support of free beds in one or more hospitals in this commonwealth for the use of its employees." [2090]

N. REPEALING CLAUSES.

§ 95. Repeal and partial repeal.

"Sections forty-nine, fifty, fifty-one, fifty-two and sixty-nine of chapter fourteen of the Revised Laws are hereby repealed. Sections thirty-seven, thirty-eight, thirty-nine, forty, forty-two, fifty-four, fifty-five, fifty-six, fifty-seven, fifty-eight, fifty-nine, sixty, sixty-one, sixty-two, sixty-three, sixty-six, sixty-seven and sixty-eight of chapter fourteen, and chapters one hundred and nine, one hundred and ten and one hundred and twenty-six except section eight of the Revised Laws, and chapter four hundred and forty-one of the acts of the year nineteen hundred and two and all other acts and parts of acts inconsistent herewith, so far as they apply to corporations which are subject to the provisions of this act, are hereby repealed." [2091]

a. Construction of this section.

The second sentence of this section was doubtless intended to repeal (1) all the acts and parts of acts therein mentioned, so far as applicable to business corporations, and (2) all other acts and parts of acts inconsistent with the Business Corpora-

[2089] Ellis v. French Canadian Co-op. Assoc., 189 Mass. 566.

[2090] St. 1903, c. 437, § 94; R. L., c. 110, § 50; St. 1889, c. 258 Not cited to 193 Mass.

This is the same as in the Revised Laws, except as to the clause about several classes of stock.

[2091] St. 1903, c. 437, § 95. Cited in Mexican Central R. Co. v. Commonwealth, 192 Mass. 130; Tulane University v. O'Connor, 192 Mass. 433; Scollard v. American Felt Co., 194 Mass. 127; Harvey-Watts Co. v. Worcester Umbrella Co., 193 Mass. 140.

tion Law, so far as applicable to business corporations. At any rate, it has been generally so regarded.[2092]

It was not clear to the author, when preparing the first edition of this book, that this intention had been carried out. For example, if the words "inconsistent with" should be held to refer to all the acts and parts of acts previously mentioned in the sentence — which construction might explain the use of the word "other" — then the repeal would apply only to acts and parts of acts when both inconsistent with the present act and also applicable to business corporations. So far as the author is aware, there are no cases of importance where the acts mentioned are not inconsistent with the present act, therefore, *cedat quæstio.*

b. Names of foreign finance corporations.

R. L., c. 126, § 8, referred to in this section, reads as follows:

"A foreign corporation which carries on a banking, mortgage, loan and investment or trust business shall indicate in letters equally conspicuous with its name, upon all signs, advertisements, circulars, letterheads and other documents which contain its name, the state or country in which it is chartered or incorporated. No such corporation and no person who is engaged in such business shall carry it on in or under a name which, previous to such use, was in lawful use by a corporation which was established under the laws of this commonwealth and was carrying on the same or a similar business or in or under a name so similar thereto as to be liable to be mistaken for it. The Supreme Judicial Court and the Superior Court shall have jurisdiction in equity to enforce the foregoing provisions of this section. Whoever violates the provisions of this section shall be punished by a fine of not more than one thousand dollars." [2093]

This act applies to corporations engaged in a banking business, a mortgage business, a loan and investment business or a trust business.[2094] If the foreign corporation has a different corporate name, but does a business similar to that of a domestic

[2092] Cf. Mexican Central R. Co. v. Commonwealth, 192 Mass. 129, 130; Harvey-Watts Co. v. Worcester Umbrella Co., 193 Mass. 138, 140.

[2093] R. L., c. 126, § 8; St. 1890, c. 329; St. 1889, c. 452, §§ 2, 3.

[2094] International Trust Co. v. International Loan & Trust Co., 153 Mass. 271, 274.

corporation and under a similar trade name, it will be enjoined; but even if the corporate name be similar, if the business carried on be unlike, an injunction will be refused.[2095]

§ 96. Construction of act.

"The provisions of this act so far as they are the same as those of existing statutes shall be construed as a continuation thereof, and not as new enactments, and a reference in a statute which has not been repealed to provisions of law which have been revised and re-enacted herein shall be construed as applying to such provisions as so incorporated in this act. The repeal of a law by this act shall not affect any act done, ratified or confirmed, or any right accrued or established, or any action, suit or proceeding commenced under any of the laws repealed before the repeal took effect, but the proceedings in such case shall, when necessary, conform to the provisions of this act." [2096]

a. Effect of repealing general act.

"The repeal of a general corporation law cannot be construed, in the absence of express provisions, as intended to repeal

[2095] Ibid., p. 276.

[2096] St. 1903, c. 437, § 96; R. L., c. 226, §§ 2, 4; Pub. St., c. 223, §§ 2, 4; Gen. St., c. 181, §§ 4, 9; Rev. St., c. 146, § 5.

Citations. — St. 1903, c. 437, § 96: Harvey-Watts Co. v. Worcester Umbrella Co., 193 Mass. 140.

Pub. St., c. 223, § 2: Com. v. Anselvich, 186 Mass. 376; Woodward v. Spurr, 138 Mass. 593.

Pub. St., c. 223, § 4: Com. v. Anselvich, 186 Mass. 376.

Gen. St., c. 181, § 4: Dolton v. Hair, 16 Gray, 150; Brigham v. Dole, 2 Allen, 50; Bigelow v. Bemis, 2 Allen, 498; Locke v. Johnson, 3 Allen, 156; Dudley v. Adams, 5 Allen, 96; Jewett v. Phillips, 5 Allen, 152; Fessenden v. Nickerson, 125 Mass. 318.

Gen. St., c. 181, § 9: Com. v. Welsh, 1 Allen, 4.

Rev. St., c. 146, § 5: Fowle v. Kirkland, 18 Pick. 299; Gay v. Richardson, 18 Pick. 419; Battles v. Forbes, 18 Pick. 533; s. c., 19 Pick. 578; McManagil v. Ross, 20 Pick. 99; Valentine v. Boston, 20 Pick. 202; Bickford v. Boston & Lowell R. R. Co., 21 Pick. 109; Sawyer v. Bancroft, 21 Pick. 210; Hewitt v. Wilcox, 1 Met. 156; Burnside v. Newton, 1 Met. 427; Wright v. Oakley, 5 Met. 408; Brigham v. Bigelow, 12 Met. 269; Hunt v. Mickey, 12 Met. 352; Gilmore v. Skiff, 4 Cush. 504; Bancroft v. Andrews, 6 Cush. 496; De Witt v. Harvey, 4 Gray, 490; Fessenden v. Nickerson, 125 Mass. 318.

This section is the same as the corresponding provisions of the Revised Laws.

the charters of corporations formed under it, especially where the manifest purpose of the repealing act is to substitute a new law, extending the provisions of the old, and perfecting its details, but not changing its general policy. It is a familiar rule of construction that when statutes are repealed by acts which substantially retain the provisions of the old laws, the latter are held not to have been destroyed or interrupted in their binding force.[2097]

b. Changes in remedies.

Changes which are mere matters of remedy, as distinguished from matters of right, do not impair any vested rights existing when the later statute takes effect.[2098] This principle has been applied in the case of proving claims under the insolvent law,[2099] and as to costs in proceedings begun before the later statute, but in which costs had not been awarded at the time of its passage.[2100] So, where a change in the law as to execution sales required the recording of a sheriff's deed, it was held that, in case of a sale after the act on proceedings begun before the act, it was necessary that there should be a record.[2101]

This principle applies *a fortiori* to changes enlarging the remedy.[2102] Where the later act provides a change in the method of procedure, under the clause that proceedings shall be changed to conform with the provisions of the later act the latter applies to a case pending when it is passed.[2103]

[2097] United Hebrew Assoc. v. Benshimol, 130 Mass. 325, 327, per Colt, J. A statute expressly repealed by the Revised Laws, but embodied in substance in a chapter thereof, is construed as continued in force and not as repealed and re-enacted. Com. v. Anselvich, 186 Mass. 376. See also Com. v. Kelliher, 12 Allen, 480.

[2098] Jewett v. Phillips, 5 Allen, 150; Bigelow v. Pritchard, 21 Pick. 169; Hewitt v. Wilcox, 1 Met. 156; Gilmore v. Skiff, 4 Cush. 504.

[2099] Jewett v. Phillips, 5 Allen, 150; Bigelow v. Pritchard, 21 Pick. 169. Cf. Bancroft v. Andrews, 6 Cush. 496.

[2100] Fessenden v. Nickerson, 125 Mass. 318. Cf. Gay v. Richardson, 18 Pick. 417; Sawyer v. Bancroft, 21 Pick. 210; Brigham v. Dole, 2 Allen, 49.

[2101] De Witt v. Harvey, 4 Gray, 490.

[2102] Hewitt v. Wilcox, 1 Met. 156.

[2103] McManagil v. Ross, 20 Pick. 99; Valentine v. Boston, 20 Pick. 202; Bickford v. Boston & Lowell R. R. Co., 21 Pick. 109; Burnside v. Newton, 1 Met. 427.

c. Changes in rights.

Any change in the law reducing certain rights will not involve an impairment of vested rights, provided the parties have already contracted for a less obligation than the new statute provides.[2104] Where an action has been begun under a form of action provided by the earlier act, it may be prosecuted to final judgment, although the form of action is abolished before the case has been completed;[2105] and rules and regulations made pursuant to a statute remain in force under this section after the repeal of such statute.[2106] Where the period of limitation of action is changed by a later act, this does not operate to continue a right which is barred under the former statute.[2107]

§ 97. Date of taking effect.

"This act shall take effect on the first day of August in the year nineteen hundred and three." [2108]

[2104] Locke v. Johnson, 3 Allen, 153, 157.
[2105] Fowle v. Kirkland, 18 Pick. 299.
[2106] Hunt v. Mickey, 12 Met. 352.
[2107] Bigelow v. Bemis, 2 Allen, 498; Wright v. Oakley, 5 Met. 411; Brigham v. Bigelow, 12 Met. 268.
[2108] St. 1903, c. 437, § 97.

APPENDIX.

FORMS.

A. OFFICIAL FORMS.

Form 1. Agreement of Association.[1]

We, whose names are hereto subscribed, do by this agreement, associate ourselves with the intention of forming a corporation according to the provisions of chapter 437 of the Acts of the year 1903, of the Commonwealth of Massachusetts, and the acts in amendment thereof and in addition thereto.

The name by which the corporation shall be known is.....

.....

The location of the principal office of the corporation within the Commonwealth is the.....

of.....and outside the Commonwealth the..... of.....State of.....

The purposes for which the corporation is formed and the nature of the business to be transacted by it are as follows:

.....

.....

The total amount of its capital stock to be authorized is....

..... dollars.

The par value of its shares is { Preferred.....dollars / Common.....dollars.

The number of its shares is { Preferred..... / Common.....

[Note. — State "the restrictions, if any, imposed upon the transfer of stock, and if there are to be two or more classes of stock, a description

[1] See St. 1903, c. 437, § 8. See also supra, chap. III, B.

of the different classes and a statement of the terms on which they are to be created and the method of voting thereon."]

[Note. — State any other provisions not inconsistent with law for the conduct and regulation of the business of the corporation, for its voluntary dissolution, or for limiting, defining or regulating the powers of the corporation, or of its directors or stockholders, or any class of stockholders.]

(If seven days' notice is given, use the following form.)

The first meeting shall be called by..... of .....

(If notice is waived, use the following form.)

We hereby waive all requirements of the statutes of Massachusetts for notice of the first meeting for organization, and appoint the.....day of.....at .....o'clock.....M., at.....as the time and place of holding said first meeting.

The names and residences of the incorporators and the amount of.....stock subscribed for by each are as follows:

NAME.	RESIDENCE.	AMOUNT SUBSCRIBED FOR.	
		Preferred.	Common.
.....			
.....			
.....			

IN WITNESS WHEREOF, we have hereunto set our hands, this .....day of.....in the year nineteen hundred and.....

Form 2. Notice of First Meeting.[2]

To.....

You are hereby notified that the first meeting of the subscribers to an agreement to associate themselves with the intention of forming a corporation to be known by the name of.... .... dated.....for the purpose of organizing said corporation by the adoption of by-laws and election of

[2] St. 1903, c. 437, § 9. See also supra, chap. III, C.

officers .....
and the transaction of such other business as may properly come before the meeting, will be held on.....
the.....day of.....at.....
o'clock....M., at.....
.....
.....,
one of the subscribers to said agreement.
.....190..

ss. 190..

I certify that I have served the foregoing notice upon each of the subscribers by copy served as follows:*.....
.....
seven days at least before the day fixed for the first meeting.

ss. 190..

Subscribed and sworn to,
Before me,
.....,
Justice of the Peace.

Form 3. Articles of Organization.[3]

WE, ...
.....
.....
.....
being a majority of the directors of the.....
.....
elected at its first meeting in compliance with the requirements of section 11 of chapter 437 of the Acts of 1903, do hereby certify that the following is a true copy of the agreement of association to form said corporation, with the names of the subscribers thereto: —

"We, whose names are hereto subscribed, do, by this agree-

[3] St. 1903, c. 437, § 11. See also supra, chap. III, D.

[* State whether "delivered in hand" *or* "deposited in the post office, post paid, addressed to each at his place of business or of residence," or left at his residence or usual place of business.]

ment, associate ourselves with the intention of forming a corporation according to the provisions of chapter 437 of the Acts of the year 1903, of the Commonwealth of Massachusetts, and the acts in amendment thereof and in addition thereto.

The name by which the corporation shall be known is.....

.....

The location of the principal office of the corporation within the Commonwealth is the.....of .....and outside the Commonwealth the .....of.....State of .....

The purposes for which the corporation is formed and the nature of the business to be transacted by it are as follows: —

.....

.....

.....

.....

The total amount of its capital stock to be authorized is.. .....dollars.

The par value of its shares is { Preferred.....dollars. / Common.....dollars.

The number of its shares is { Preferred..... / Common.....

[Note. — State "the restrictions, if any, imposed upon the transfer of stock, and if there are to be two or more classes of stock, a description of the different classes and a statement of the terms on which they are to be created and the method of voting thereon."]

.....

.....

.....

.....

[Note. — State any other provisions not inconsistent with law for the conduct and regulation of the business of the corporation, for its voluntary dissolution, or for limiting, defining or regulating the powers of the corporation, or of its directors or stockholders, or any class of stockholders.]

.....
.....
.....
.....
.....

(If seven days' notice is given, use the following form.)

The first meeting shall be called by.....
of .....

(If notice is waived, use the following form.)

We hereby waive all requirements of the statutes of Massachusetts for notice of the first meeting for organization, and appoint the.....day of.....at .....o'clock.....M., at.....as the time and place of holding said first meeting.

The names and residences of the incorporators and the amount of stock subscribed for by each are as follows: —

NAME.	RESIDENCE.	AMOUNT SUBSCRIBED FOR.	
		Preferred.	Common.
.....			
.....			
.....			

IN WITNESS WHEREOF, we have hereunto set our hands, this .....day of.....in the year nineteen hundred and.....

That the first meeting of the subscribers to said agreement was held on the.....day of..... in the year nineteen hundred and.....

That the amount of capital stock now to be issued is..... .....shares of preferred stock, ...shares of common stock, to be paid for as follows: —

AMOUNT AND CLASS OF STOCK ISSUED.

	SHARES PERFERRED.	SHARES COMMON.
IN CASH:		
In full.....		
By instalments.....		
Amount of instalment to be paid before commencing business		
IN PROPERTY:		
Real estate:		
Location		
Area		
Personal property:		
Machinery		
Merchandise.....		
Bills receivable.....		
Stock and securities.....		
Patent rights.....		
Trade marks.....		
Copyrights		
Good will.....		
Services.....		
Expenses...		

[NOTE. — State clearly the nature of such services or expenses and the amount of stock to be issued therefor.]

The name, residence and post office address of each of the officers are as follows: —

NAME OF OFFICE.	NAME.	RESIDENCE.	POST OFFICE ADDRESS.
President,			
Treasurer,			
Clerk or Secretary,			
Directors,			

IN WITNESS WHEREOF, we have hereunto signed our names, this.....day of..... in the year nineteen hundred and.....

....
....
....
....

COMMONWEALTH OF MASSACHUSETTS.

ss. 190..

Then personally appeared the above-named.....
.....
.....
.....
and severally made oath that the foregoing certificate by them subscribed, is true to the best of their knowledge and belief.

Before me,

....., ...,

Justice of the Peace.

[The endorsement of the Commissioner on the back of the foregoing is as follows:]

I hereby certify that it appears, upon an examination of the within written articles and the records of the corporation duly submitted to my inspection, that the requirements of chapter four hundred and thirty-seven of the Acts of nineteen hundred and three relating to the organization of corporations have been complied with, and I hereby approve said articles this..... day of.....A. D. nineteen hundred and.....

....., ...,

Commissioner of Corporations.

Form 4. Issue of Capital Stock.[4]

WE, ...President, ...
Treasurer, and.....
.....
.....
being a majority of the directors of.....
.....
in compliance with the provisions of section 14, chapter 437, of the Acts of 1903 and of all acts in amendment thereof and in addition thereto, do hereby certify that of the capital stock of said corporation fixed in its articles of organization.....

[4] See St. 1903, c. 437, § 14.

dollars has been authorized to be issued in addition to the amount already certified in said articles and in certificates heretofore filed in the office of the Secretary of State.

That the total amount of capital stock authorized is.....
.....{ shares preferred.
.....{ shares common.

The amount of capital stock already issued for cash payable by instalments is .....
.....{ shares preferred.
.....{ shares common.
upon which.....dollars have been paid, namely,
.....{ dollars on preferred stock.
.....{ dollars on common stock.

The amount of full paid stock already issued for cash is....
.....{ shares preferred.
.....{ shares common.

The amount of full paid stock already issued for property is
.....{ shares preferred.
.....{ shares common.

The amount of full paid stock already issued for services and expenses is .....
.....{ shares preferred.
.....{ shares common.

That the amount of additional stock to be issued for cash, property, services or expenses is $.....of which
.....{ shares are preferred.
.....{ shares are common.

To be paid for as follows:

	PREFERRED.	COMMON.
IN CASH:		
In full.....		
By instalments.....		
Amount of first instalment.....		
IN PROPERTY:		
Real estate:		
Location.....		
Area.....		
Personal property:		
Machinery.....		
Merchandise.....		
Bills receivable.....		
Stocks and securities.....		
Patent rights.....		
Copyrights.....		
Trade marks.....		
Good will.....		
Services.....		
Expenses.....		

[NOTE — State clearly the nature of such services and expenses.]

IN WITNESS WHEREOF, we have hereunto signed our names, this.....day of.....in the year nineteen hundred and.....

COMMONWEALTH OF MASSACHUSETTS.

ss. 190..

Then personally appeared the above-named.....

.....

.....

and severally made oath that the foregoing certificate, by them subscribed, is true, to the best of their knowledge and belief.

Before me,

....., ...,

Justice of the Peace.

[The approval of the Commissioner of Corporations is to be endorsed hereon, after which the certificate is filed with the Secretary of the Commonwealth.]

Form 5. Certificate of Changes of Officers.[5]

WE, ...President, ...Clerk, and .....

.....

.....

being a majority of the directors of.....

.....

in compliance with the provisions of chapter two hundred and eighty-two of the Acts of 1907, do hereby certify that the following changes in name and address of the officers of the corporation have been made.

NAME OF OFFICE.	NAMES.	ADDRESSES.	EXPIRATION OF TERM OF OFFICE.
President,			
Treasurer,			
Clerk,			
Directors,			

IN WITNESS WHEREOF, we have hereto signed our names this.....day of.....in the year nineteen hundred and.....

COMMONWEALTH OF MASSACHUSETTS.

ss. 190..

Then personally appeared the above-named.....

.....

.....

and severally made oath that the foregoing certificate, by them subscribed, is true, to the best of their knowledge and belief.

Before me,

....., ...,

Justice of the Peace.

[5] See supra, chap. v, § 18, *q*, and St. 1907, c. 282.

Form 6. Articles of Amendment — General Amendments.[6]

WE, ...President, ...
Treasurer, and.....
.....
.....being a majority of the Directors of
.....
in compliance with the provisions of chapter 437 of the Acts of 1903 and of all acts in amendment thereof and in addition thereto, do hereby certify that at a meeting of the stockholders of the said corporation, duly called for the purpose, held..... 190.., and by the affirmative vote of.....shares of the preferred stock and of.....shares of the common stock of said corporation, being at least.....
.....
of all the stock outstanding and entitled to vote, the following amendment or alteration in the.....
of said corporation was duly adopted, namely:

IN WITNESS WHEREOF, we have hereunto signed our names, this.....day of.....in the year nineteen hundred and.....

COMMONWEALTH OF MASSACHUSETTS.

ss. 190..

Then personally appeared the above-named.....
.....
.....
and severally made oath that the foregoing certificate, by them subscribed, is true, to the best of their knowledge and belief.

Before me,

....., ...,

Justice of the Peace.

[The approval of the Commissioner of Corporations is to be endorsed upon the foregoing.]

[6] St. 1903, c. 437, § 41.

Form 7. Same — Increase of Capital.[7]

ARTICLE I. WE, ...President, ...
.....Treasurer, and.....
.....
.....being a majority of the Directors of
.....
in compliance with the provisions of chapter 437 of the Acts of 1903 and of all acts in amendment thereof and in addition thereto, do hereby certify that at a meeting of the stockholders of the said corporation, duly called for the purpose, and by the affirmative vote of.....shares of the preferred stock and of.....shares of the common stock of said corporation, being at least a majority of all the stock outstanding and entitled to vote, the following amendment authorizing an increase in the capital stock of said corporation was duly adopted, namely:

ARTICLE II. [Here insert an exact copy of the vote or votes authorizing the increase, and the "terms and manner of the disposition of such increased stock."]

ARTICLE III. That the total amount of capital stock already authorized is.....
..... { shares preferred.
..... { shares common.

The amount of capital stock already issued for cash payable by instalments is.....
..... { shares preferred.
..... { shares common.
upon which.....dollars have been paid, namely, ...
..... { dollars on preferred stock.
..... { dollars on common stock.

The amount of full paid capital stock already issued for cash is.....

[7] St. 1903, c. 437, § 42.

..... { shares preferred.
..... { shares common.
for property is.....
..... { shares preferred.
..... { shares common.
for services and expenses.....
..... { shares preferred.
..... { shares common.

ARTICLE IV. That the amount of additional capital stock authorized is.....
..... { shares preferred.
..... { shares common.

To be paid for as follows:

	PREFERRED.	COMMON.
IN CASH:		
In full.....		
By instalments.....		
Amount of first instalment.....		
IN PROPERTY:		
Real estate:		
Location		
Area.....		
Personal property:		
Machinery.....		
Merchandise.....		
Bills receivable.....		
Stocks and securities.....		
Patent rights.....		
Copyrights.....		
Trade marks		
Good will		
Services.....		
Expenses.....		

[NOTE. — State clearly the nature of such services and expenses.]

IN WITNESS WHEREOF, we have hereunto signed our names, this.....day of.....in the year year nineteen hundred and.....

COMMONWEALTH OF MASSACHUSETTS.

ss. 190..

Then personally appeared the above-named.....
.....
.....
and severally made oath that the foregoing certificate, by them subscribed, is true, to the best of their knowledge and belief.

Before me,

....., ...,
Justice of the Peace.

[The approval of the Commissioner of Corporations is to be endorsed upon the foregoing.]

Form 8. Same — Reduction of Capital.[8]

ARTICLE I. WE, ...President,.....
....., Treasurer, and.....
.....
.....being a majority of the Directors of
.....
in compliance with the provisions of chapter 437 of the Acts of 1903 and all acts in amendment thereof and in addition thereto, do hereby certify that at a meeting of the stockholders of the said corporation duly called for the purpose, held..... 190.., and by the affirmative vote of.....shares of the preferred stock and.....shares of the common stock of said corporation, being at least a majority of all the stock outstanding and entitled to vote, the following amendment authorizing a reduction in the capital stock of said corporation was duly adopted, namely:

ARTICLE II. [Here insert an exact copy of the vote or votes authorizing the reduction.]

[8] See St. 1903, c. 437, § 43.

ARTICLE III. That the total amount of capital stock already authorized is.....

..... { shares preferred.

..... { shares common.

The amount of capital stock already issued is.....

..... { shares preferred.

..... { shares common.

That the amount of reduction of capital stock now authorized by the stockholders is.....

.....

The manner in which said reduction will be effected is as follows:

.....

.....

IN WITNESS WHEREOF, we have hereunto signed our names, this.....day of.....in the year nineteen hundred and.....

COMMONWEALTH OF MASSACHUSETTS.

ss. 190..

Then personally appeared the above-named.....

.....

.....

and severally made oath that the foregoing certificate, by them subscribed, is true, to the best of their knowledge and belief.

Before me,

.....

Justice of the Peace.

[The approval of the Commissioner of Corporations is to be endorsed on the foregoing.]

Form 9. Certificate of Condition.[9]

[It is expected that this blank can be readily filled from the report of affairs made to the stockholders at their annual meeting.]

[9] See St. 1903, c. 437, § 45.

[Corporations with a capital of $100,000 or more must appoint an auditor to certify the certificate. (See chapter 437, section 47.) *The fee for filing this certificate is* $5.00, *and should accompany the certificate. Checks should be made payable to the order of the Secretary of the Commonwealth.*]

WE, ... President,.....
Treasurer, and.....
being a majority of the Directors of the.....
in compliance with the provisions of chapter 437 of the Acts of 1903 and all acts in amendment thereof and in addition thereto, do hereby certify:

1. That the name of said corporation is.....

2. That the location of its principal office in this Commonwealth is No.....Street, [city or town].....and outside this Commonwealth, No.....Street, [city or town].....State of .....

3. That the date of its last annual meeting was..... 190..

4. That the total amount of its authorized capital stock is .....

   The amount issued and outstanding at said date was
   .....shares preferred.....
   .....shares common.....

   The amount then paid thereon was.....
   ..... { preferred.....dollars.
   ..... { common.....dollars.

   That said capital stock is divided into.....
   shares, of which.....shares are preferred and.....shares common, and the par value of said stock is... { preferred.....dollars. / common.....dollars.

5. That the assets and liabilities of the corporation, at the date of the end of its last fiscal year were as follows:

....., 190..

[Insert here date at end of fiscal year, which by section 20 should not be more than ninety days prior to the date fixed in the by-laws for the annual meeting.]

ASSETS.	$		LIABILITIES.	$	
Real estate.....			Capital stock.....		
Machinery.....			Accounts payable....		
Merchandise:			Funded indebtedness..		
Manufactures, merchandise, material and stock in process.....			Floating indebtedness.		
			Surplus.....		
			Profit and loss.....		
Cash and debts receivable					
Patent rights.....					
Trade marks.....					
Good will.....					
Profit and loss.....					
Total.....			Total		

6. That the names and addresses of all the directors and officers of the corporation and the dates at which the term of office of each expires are as follows: —

NAME OF OFFICE.	NAMES.	ADDRESSES.	EXPIRATION OF TERM OF OFFICE.
President,			
Treasurer,			
Clerk,			
Directors,			

IN WITNESS WHEREOF, we have hereto signed our names, this.....day of.....in the year nineteen hundred and.....

COMMONWEALTH OF MASSACHUSETTS.

ss. 190..

Then personally appeared the above-named.....
.....
.....
and severally made oath that the foregoing certificate by them subscribed, is true to the best of their knowledge and belief.

Before me,

....., ...,

Justice of the Peace.

[*If out of Massachusetts, oath may be taken before a commissioner for Massachusetts, or notary public; if within Massachusetts, before a notary public or justice of the peace.*]

AUDITOR'S CERTIFICATE.

[This certificate is to be used only by corporations having a paid-in capital of $100,000 or more.]

....., 190..

I, ...of.....the duly selected Auditor of.....
a corporation duly established by law, hereby certify that I have completed the examination of the books of said corporation, and its certificate of condition *as executed by its officers,* to which this certificate is attached, and find that said certificate represents the true condition of the affairs of said corporation as disclosed by its books. This certificate is made by me in compliance with the provisions of section 47 of chapter 437 of the Acts of 1903.

....., ...,

Auditor.

COMMONWEALTH OF MASSACHUSETTS.

. , ss. 190..

Then personally appeared the above-mentioned..... and made oath that the above certificate by him subscribed is true.

Before me,

....,

Justice of the Peace.

[The approval of the Commissioner of Corporations is to be endorsed on the foregoing.]

Form 10. Appointment of Auditor.[10]

The undersigned stockholders,* a committee selected at the annual meeting of..... a corporation with a capital of $100,000, or more, held at .....on the.....day of..... ....., A. D. 19.., have on the..... day of....., A. D. 190.., employed..... .....of.....as Auditor pursuant to the provisions of section 47, of chapter 437 of the Acts of 1903.

....
.... } *Stockholders or Directors.*
....

[* Selection of Auditor to be made by three stockholders who are not directors, if there are so many; otherwise, by the directors. Auditors must be sworn before a justice of the peace or other magistrate authorized to administer oaths.]

STATE OF.....

....., ss. .....190..

Then personally appeared the above-named..... .....and made oath that he would faithfully perform the duties of Auditor of the aforesaid corporation, as required by section 47 of chapter 437 of the Acts of 1903.

....

.....

[10] See St. 1903, c. 437, § 47.

Form 11. Report as to Date of Annual Meeting.[11]

.....190..

To WILLIAM D. T. TREFRY,
COMMISSIONER OF CORPORATIONS,
STATE HOUSE, BOSTON.

Sir:

It is provided by the By-Laws of the.....
.....
that the annual meeting of said corporation shall be held on the.....day of.....in each year.

Respectfully yours,

.....,

Post-Office Address.....

[Note that the statute requires the annual meeting to be held within sixty days after the end of the fiscal year of the corporation.]

Form 12. Certificate of Change in Date of Annual Meeting.[12]

.....190..

I, ...Clerk of the
.....
hereby certify that at meeting of said corporation held.....
....., the date fixed in the by-laws for the annual meeting of the corporation was changed to.....
day of.....in each year.

.....

Clerk.

COMMONWEALTH OF MASSACHUSETTS.

.....ss. .....190..

Then personally appeared.....
and made oath that the foregoing affidavit by him subscribed is true to the best of his knowledge and belief.

Before me,

.....

Justice of the Peace.

[11] See St. 1903, c. 437, § 20. The annual meeting must be held within ninety days of the end of the fiscal year. St. 1904, c. 207.

[12] See supra, chap. v, § 13, *f*, and St. 1905, c. 222.

Form 13. Annual Tax Return.[13]

P. O. Address of Treasurer at .....

.....190..

To WILLIAM D. T. TREFRY,

Tax Commissioner.

I, ...Treasurer of the .....hereby certify on behalf of said corporation that on the first day of May, ..., said corporation had its place of business at.....

1. The total authorized amount of its capital stock was { common or general $ / preferred $
   The amount issued and outstanding was { common or general $ / preferred $
   The amount then paid thereon was { common or general $ / preferred $
   The whole number of its shares was { common or general / preferred
   The par value of its shares was { common or general $ / preferred $
   The market value of its shares was { common or general $ / preferred $

2. (*a*) The value of the real estate, machinery, merchandise and other assets owned by the corporation within and without the State was as follows: —

ASSETS.			LIABILITIES.	$	
*Real estate.....			Capital stock.....		
Machinery.....			Notes payable		
Merchandise			Other liabilities (giving items).....		
Notes.....					
Bills receivable					
Cash.....					
Other assets:					
Total.....			Total.....		

[13] See St. 1903, c. 437, § 48.

(*b*) Property owned by the corporation situated in another State or country and subject to taxation therein: —

Real estate . . . . . $.....

Machinery . . . .

Merchandise . . . .

Other assets (giving items) . .....

*(*c*) Securities: — This schedule should include all securities owned by the corporation, those which if owned by a natural person resident in this Commonwealth would be liable to taxation, as well as those which would not be liable to taxation.

No. of Shares.	Description of Securities.	Amount Invested Therein.	

* The term "real estate, machinery and merchandise" is intended to cover all the tangible property of a business corporation, and the term "securities" all choses in action which would be taxable to a natural person resident in Massachusetts.

The following is a complete list of the stockholders in said corporation, their residences and number of shares held by each on the first day of May, 190 : —

[The attention of treasurers is called to the *necessity* of giving the *correct residence* of each stockholder. Strictly, the law requires the name of the town or *city* (not the post office) to be *written out in full* against *each* name, — and this is the only way to prevent mistakes.]

Name.	Residence.	Number of Shares.	
		Common or General.	Preferred.

IN WITNESS WHEREOF, the said.....
Treasurer of the.....Company,
has hereto signed his name this.....day of.....
in the year 19..

.....

COMMONWEALTH OF MASSACHUSETTS.

ss..... .....19..

Then personally appeared the above-named.....
Treasurer of the.....Company,
and made oath that the foregoing certificate by him subscribed is true to the best of his knowledge and belief.

Before me,

.....

Justice of the Peace.

Form 14. Appointment of Attorney by Foreign Corporation.[14]

Know all Men by these Presents,

That the.....
....., a Corporation located in the.....of....., in the State of.....
....., and established under the laws of said State, desiring to transact business in the Commonwealth of Massachusetts in conformity with the laws thereof, hereby constitutes and appoints the Commissioner of Corporations of said Commonwealth, or his successor in office, to be the true and lawful Attorney of said Corporation, in and for the said Commonwealth, upon whom all lawful processes in any action or proceeding against said Corporation in said Commonwealth may be served, in like manner and with the same effect as if said Corporation existed therein. And the said Corporation hereby stipulates and agrees, that any lawful process against said Corporation, which is served on its said Attorney, shall be of the same legal force and validity as if served on said Corporation.

[14] See St. 1903, c. 437, § 58.

This appointment and the authority of said Attorney shall continue in force so long as any liability remains outstanding against said Corporation in said Commonwealth.

IN WITNESS WHEREOF, the aforesaid Corporation, pursuant to a resolution of its Board of Directors, duly passed on the.....day of.....A. D. 190.. (a certified copy whereof is hereto annexed), hath caused these presents to be subscribed by its President and countersigned by its Clerk *or Secretary,* and the corporate seal of said Corporation to be hereunto affixed, this..... day of....., in the year one thousand nine hundred and.....

.....*President.*

.....*Clerk* [or Secretary].

[N. B. The seal of the corporation should be affixed.]

STATE OF.....
COUNTY OF..... } ss.

On this.....day of....., A. D. 190.., before me, the subscriber, a*....., duly appointed and qualified, personally appeared the beforenamed.....President, and..... .....Clerk *or Secretary,* of the..... (who are personally known to me), and severally acknowledged the execution of the foregoing instrument by them subscribed, and they severally made oath that they are respectively the afore-described officers of said Corporation; that the seal affixed to said instrument is its true and proper corporate seal; and that they subscribed said instrument, and said corporate seal was affixed, by virtue of authority duly conferred by said Corporation.

WITNESS my hand and official seal, at..... in the State and county aforesaid, the day and year above written.

....

.....

[* If out of Massachusetts, before a commissioner for Massachusetts or notary public. If within Massachusetts, before a notary public or justice of the peace.]

[COPY.]

At a meeting of the Board of Directors of the.....
....., a Corporation established under the laws of the State of....., duly held on the..... day of.....A. D. 190.., a quorum being present, the following Resolution was adopted: — .

"RESOLVED, that this Corporation hereby appoints the Commissioner of Corporations of the Commonwealth of Massachusetts, or his successor in office, to be its true and lawful attorney, in and for said Commonwealth, upon whom all lawful processes in any action or proceeding against this Corporation in said Commonwealth may be served, in like manner and with the same effect as if this Corporation existed therein. And this Corporation hereby stipulates and agrees that any lawful process against it, which is served on its said Attorney shall be of the same legal force and validity as if served on this Corporation. This appointment, and the authority of said Attorney, shall continue in force so long as any liability remains outstanding against this Corporation in said Commonwealth; and the President and Clerk *or Secretary* are hereby authorized to execute, in the name of the Corporation, and under its corporate seal, a certificate of authority or power of attorney to the said Commissioner of Corporations, in conformity with this Resolution and the laws of said Commonwealth."

I HEREBY CERTIFY, that the above is a true copy of the Resolution of the Directors of this Corporation, authorizing the appointment of an Attorney for the Commonwealth of Massachusetts, as recorded by me.

.....*Clerk* [or Secretary].

Form 15. Certificate of Foreign Corporation.[15]

WE, ... President, ...
Treasurer, and.....
.....
being a majority of the Directors of.....

[15] See St. 1903, c. 437, § 60.

a corporation organized under the laws of..... in compliance with the provisions of chapter 437 of the Acts of 1903, do hereby certify as follows concerning said corporation: —

1. That the name of said corporation is.....

2. That the location of its principal office is.....

3. That the names and addresses of its officers are as follows: —

	NAME.	ADDRESS.
President,		
Treasury,		
Clerk or Secretary,		
Directors,		

4. That the date of its annual for the election of officers is .....

5. That the amount of its capital stock authorized is .....dollars.

The amount of capital stock issued is.....dollars.

The number of its shares is { Preferred..... / Common.....

The par value of its shares is { Preferred.....dollars. / Common.....dollars.

The amount paid in thereon to the treasurer is { Preferred.....dollars. / Common.....dollars.

The amount of such payment made otherwise than in money is as follows: —

Paid in property, viz.: — [State here the number of shares issued on each item.]

	PREFERRED.	COMMON.
Real estate.....		
location,		
area,		
Machinery.....		
Merchandise.....		
Bills receivable..... ...		
Stocks and securities..		
Patent rights.....		
Trade marks..... ...		
Copyrights		
Good will.....		
Services*.....		
Expenses*.....		

*State the nature of such service or expenses.

6. Usual place of business in this Commonwealth, ...

7. To whom and where shall notice and copies of legal process be addressed? .....
.....
.....
.....

IN WITNESS WHEREOF, we have hereunto signed our names, this.....day of.....in the year nineteen hundred and.....

STATE OF..... } ss.
..... }

.....190..

Then personally appeared the above-named.....
.....
.....
.....
and severally made oath that the foregoing certificate, by them subscribed, is true to the best of their knowledge and belief.

Before me,

....

[If out of Massachusetts, oath before a commissioner for Massachusetts or notary public; if within Massachusetts, before a notary public or justice of the peace.]

Form 16. Certificate of Condition — Foreign Corporation.[16]

Post-office address of Company in Massachusetts:

.....

Check for excise tax should be made payable to treasurer and receiver general.

SECTION 90. The fee for filing this certificate is $5.00, and should accompany the certificate. Checks should be made payable to the secretary of the commonwealth.

WE, ...President, ...Treasurer, and .....
.....
.....
being a majority of the Directors of.....,
.....
a Corporation organized under the laws of the State of.....
.....having a usual place of business in
.....in the Commonwealth of Massachusetts, in compliance with the provisions of chapter 437 of the Acts of 1903, do hereby certify, that the amount of its authorized capital stock on the.....

(Not later than date of annual meeting.)

day of.....19.., was.....
.....dollars.

That said Corporation has paid local taxes in this Commonwealth during the preceding year to the amount of $.....
.....[16a]

That the assets and liabilities of the Corporation on the above date were as follows: —

NOTE. — This should be of a date not more than ninety days prior to the annual meeting.

[16] See St. 1903, c. 437, §§ 58, 66, 75.

[16a] But see supra, p. 405.

ASSETS.	$		LIABILITIES.	$	
Real estate.....			Capital stock.....		
Machinery.....			Accounts payable.....		
Merchandise:			Funded indebtedness..		
Manufactures, merchandise, material and stock in process.....			Floating indebtedness.		
			Surplus.....		
			Profit and loss.....		
Cash and debts receivable					
Patent rights.....					
Trade marks					
Good will.....					
Profit and loss.....					
Total.....			Total.....		

State here the change, or changes, if any, since the filing of the certificate required by section 60, or since the filing of the last annual report, in the following particulars: —

a. The name of the corporation.

b. The location of its principal office.

c. The names and addresses of the president, treasurer, clerk or secretary, and directors.

	NAME.	ADDRESS.
President,		
Treasurer,		
Clerk or Secretary,		
Directors.		

d. The date of annual meeting for election of officers.

e. The amount of capital stock authorized is.....dollars.

The amount of capital stock issued is.....dollars.

The amount paid in thereon to the treasurer is { Preferred.....dollars. / Common.....dollars.

The number of its authorized shares is { Preferred..... / Common.....

The par value of its shares is { Preferred.....dollars. / Common.....dollars.

The amount of such payment made otherwise than in money is as follows: —

Paid in property, viz.: — [State here the number of shares issued on each item.]

	PREFERRED.	COMMON.
Real estate.....		
location,		
area,		
Machinery		
Merchandise.....		
Bills receivable..... ...		
Stocks and securities.....		
Patent rights.....		
Trade marks.....		
Copyrights.....		
Good will		
Services.....		
Expenses.....		

[State the nature of such services and expenses.]

IN WITNESS WHEREOF, we have hereunto signed our names, this.....day of.....in the year nineteen hundred and.....

STATE OF..... } ss.
..... }

.....190..

Then personally appeared the above-named.....
.....
.....
.....
and severally made oath that the foregoing certificate, by them subscribed, is true to the best of their knowledge and belief.

*Before me.

[* If out of Massachusetts, oath before a commissioner for Massachusetts or notary public; if within Massachusetts, before a notary public or justice of the peace.]

AUDITOR'S CERTIFICATE.

(This certificate is to be used only by corporations having a paid-in capital of $100,000, or over.)

.....190..

I, ...of.....the duly selected Auditor of.....
a Corporation duly established by law, hereby certify that I have completed the examination of the books of said Corporation, and its certificate of condition *as executed by its officers,* to which this certificate is attached, and find that said certificate represents the true condition of the affairs of said Corporation, as disclosed by its books. This certificate is made by me in compliance with the provisions of section 47 of chapter 437 of the Acts of 1903.

.....

Auditor.

COMMONWEALTH OF MASSACHUSETTS.

.....ss. .....190..

Then personally appeared the above-named.....
.....and made oath that the above certificate by him subscribed is true.

Before me,

....

Justice of the Peace.[16b]

[The approval of the Commissioner of Corporations is to be endorsed hereon.]

Form 17. Appointment of Auditor — Foreign Corporation.

The Board of Directors of.....
.....
a corporation with a capital of $100,000 or more, at a meeting held at.....on the.....day of ....., A. D. 190.., have employed

[16b] If the auditor is out of the State, it seems that the jurat with a suitable caption should be made before a commissioner for Massachusetts or a notary public. The above is the official form.

.....of..... as Auditor pursuant to the provisions of section 67, of chapter 437, of the Acts of 1903.

.....
.....
.....
Directors.
or
.....*Clerk of the Board.*

STATE OF.....
.....ss. .....190..

Then personally appeared the above-named.....
.....and made oath that he would faithfully perform the duties of Auditor of the aforesaid corporation, as required by section 67, of chapter 437, of the Acts of 1903.

Before me,

.....
.....

If in the State, oath may be taken before a justice of the peace or other magistrate authorized to administer oaths; if out of the State, before a commissioner for Massachusetts or notary public.

Form 18. Certificate of Increase of Capital — Foreign Corporation.[17]

WE, ...President, ...
Treasurer, and.....
.....being a majority of the Directors of.....,
a Corporation organized under the laws of the State of.....
....., in compliance with the provisions of the 65th section of chapter 437 of the Acts of 1903, do hereby certify that the capital stock of said Corporation has been increased by the amount of.....
dollars, and that the same has all been paid in.

IN WITNESS WHEREOF, we have hereto signed our names, this .....day of.....in the year nineteen hundred and.....

[17] See St. 1903, c. 437, § 65.

COMMONWEALTH OF MASSACHUSETTS.

.....ss. .....190..

Then personally appeared the above-named.....
.....
.....
.....

and severally made oath that the foregoing certificate, by them subscribed, is true, to the best of their knowledge and belief.

Before me,

.....

[The approval of the Commissioner of Corporations is to be endorsed hereon.]

B. FORMS CONNECTED WITH ORGANIZATION.[18]

(1) *Subscriptions to Stock.*

Form 19. Subscription Agreement.

Whereas the organization is contemplated of a corporation under the laws of the Commonwealth of Massachusetts, to be known as the.....Company or by such other name as may be selected, with a capital stock of not less than $..... for the purpose of.....:....., and it is desired by the undersigned to become a shareholder in the said corporation:

Now Therefore, ..., the undersigned, does hereby promise and agree to and with [*insert name of promotor or person organizing the corporation*] of....., in consideration of the promises of the said..... hereinafter stated, that he will pay to the said..... or to any person or corporation to whom he may assign this agreement, on demand, the sum of.....dollars, being the subscription price of.....shares of the capital stock of the said corporation, or such part thereof as may be called for. The stock thus paid for to be delivered at the earliest possible moment after the organization of the company.

[18] See also supra, A, "Official Forms."

This agreement is conditioned upon the procuring by the said.....of other *bona fide* subscriptions, aggregating in all not less than $....., to the capital stock of the said corporation.

The said.....on his part, in consideration of the foregoing, promises to use his best endeavors to obtain such amount of subscriptions, and his best efforts to perfect the organization of the said corporation.

Witness our hands and seals this.....day of....., 190..

Form 20. Same — Shorter Form.

We, the undersigned, hereby agree to organize a corporation under the general laws of Massachusetts, to be known as the .....Company, with a capital stock of.....dollars, divided into..... shares of the par value of.....dollars each, for the purpose of....., to be located at.....; and we hereby agree to pay to the treasurer of said corporation the amount of the shares of the capital stock set against our several names, in such amounts, and at such times and places as the directors may demand by a notice mailed to each subscriber seven days, at least, before such subscription is payable.

DATE.	NAME.	ADDRESS.	SHARES.	AMOUNT.

Form 21. Assignment of Subscription.

For value received, I, ...of..... hereby assign, transfer and set over into..... all my right, title and interest as a subscriber to and an incorporator of the.....Company, to the extent of.....shares of the capital stock thereof, and I hereby direct said Company to issue the certificate for said shares in the name of said.....or his assigns.

Witness my hand and seal this.....day of .....

(2) *General Purpose Clauses.*

Form 22. Acquiring Real and Personal Property.

Generally to purchase, take on lease or by exchange, or otherwise acquire, any real and personal property, and any rights or privileges which the company may think necessary or convenient for the purposes of its business.

Form 23. Absorbing Other Concerns.[19]

To acquire good-will, rights, property and assets of all kinds, and to undertake the whole or any part of the liabilities, of any person, firm, association or corporation, and to pay for the same in cash, stock, bonds, debentures or other securities of this corporation, or otherwise.

Form 24. Same — Another Form.

To acquire and take over as a going concern the business now carried on at No. .....Street, ... under the style or firm of A. B. & Co., and all or any of the assets and liabilities of the proprietors of that business in connection therewith.

Form 25. Borrowing Money and Issuing Bonds.

To borrow or raise moneys for the purposes of its incorporation, to issue its bonds, notes or other obligations for moneys

[19] See also infra, Forms 82 and 92.

so borrowed, or in payment of or in exchange for, any real or personal property, or rights or franchises acquired, or other value received by the corporation and to secure such obligations by pledge, or mortgage under deed of trust or otherwise, of or upon the whole or any part of the property at any time held by the corporation, and to sell or pledge such bonds, or discount such notes or other obligations, for the proper purposes of its incorporation.

(3) *Special Purpose Clauses.*

Form 26. Advertising.[20]

Buying, selling, handling, dealing in, advertising, and putting on the market, samples, sample books, sample supplies, dry goods and merchandise of every kind and variety used or to be used in a general sample and supply business, also buying, owning, holding, selling, and disposing of any letters patent, trade marks, and copyrights issued, used or required in carrying on said business; and doing all things incident, convenient or necessary to such business, and dealing in all articles, merchandise and property necessary or incidental to, or convenient for the carrying out of any of the aforesaid purposes.

Form 27. Art Dealers.

Buying, selling and dealing in paintings, water colors, etchings, engravings and works of art, and manufacturing and dealing in picture frames, and buying, manufacturing and dealing in any and all property and things in any way connected with said business.

Form 28. Automobiles.

To manufacture, buy, sell, lease, export, import and generally deal in automobiles and motors of all kinds to be operated by steam, compressed air, electricity, gasoline or other kind of power, and all parts and appliances and mechanical devices which may enter into the construction of automobiles and motors, or are used in connection therewith; to rent and store

[20] See also infra, Forms 60, 61, 97 and 98.

automobiles, and to conduct a general garage business; to repair, rebuild, alter and generally to do an automobile repair shop business; to supply gasoline, alcohol, electricity and other fuel and motive power for automobiles; and generally to carry on any business incident to the foregoing purposes.

Form 29. Boots and Shoes.

Manufacturing, buying, selling and otherwise dealing in boots, shoes, slippers and kindred articles and the doing of all things incident, convenient or necessary to such business.

Form 30. Same.

Carrying on the business of manufacturing and dealing in boots, shoes and leather of all kinds, and of all articles and things used in the manufacture and workng thereof; of buying, selling and dealing in apparatus, machinery, materials and articles of all kinds which shall be capable of being used for the purposes of the business herein mentioned, or likely to be required by the customers of such business; of purchasing or otherwise acquiring patents, patent rights and privileges, trade marks and trade names, and improved or secret processes that are in any way related to any of the objects aforesaid, and of granting licenses for the use of or of selling or otherwise dealing in any patents, patent rights and privileges, trade marks and trade names, and improved or secret processes required by the company.

Form 31. Same.

Manufacturing and selling boots, shoes and slippers; the buying and selling of boots, shoes and slippers; dealing in and selling boots, shoes and slippers at wholesale, retail and on commission, the buying, selling and dealing in leather and all other materials necessary for the manufacturing of boots, shoes and slippers, including therein all machinery, machines, engines, tools and supplies of every name and nature necessary or useful therefor and the doing of any and all things connected with or incidental to the carrying on of the business above or any branch or part thereof.

Form 32. Same — Shorter Form.

Manufacturing, buying and dealing in and selling boots, shoes and slippers at wholesale, retail and on commission; dealing in leather and materials necessary for the manufacturing of boots, shoes and supplies, including machinery, tools and supplies of every nature necessary or useful therefor and the doing of any and all things connected with or incidental to the business.

Form 33. Boot and Shoe Machinery.

Buying, selling, patenting, developing, repairing and exchanging shoe working and all other kinds of machinery, together with such other articles as usually accompany and form a part of the aforesaid business, also the buying, selling and developing of patents on machinery.

Form 34. Brokers.

Buying, selling and dealing in municipal, railroad and corporation bonds, stocks, mortgages and commercial paper, and doing a general investment and brokerage business.

Form 35. Building.

Carrying on a general building and construction business and manufacturing and dealing in builders' supplies.

Making, entering into, performing and carrying out contracts for constructing, altering, decorating, maintaining, furnishing, fitting up and improving buildings of every sort and kind; advancing money to and entering into contracts and arrangements of all kinds with builders, property owners and others; carrying on in all their respective branches the businesses of builders, contractors, decorators, dealers in stone, brick, timber, hardware, and other building materials or requisites.

Form 36. Building and Development.[21]

Carrying on the business of building railways, houses, turnpikes, public and private highways and roads, draining, re-

[21] See infra, Forms 83, 102, 103, 109.

claiming and improving submerged, swampy or other lands; cultivating any and all kinds of crops, selling and utilizing the same for manufacturing products therefrom; buying, selling and dealing in merchandise.

Form 37. Building Materials.

Selling at retail building materials, lumber, lime, cement, sand and bricks, and other materials and dealing in merchandise generally; owning and operating vessels and other means of transportation except railroads and doing such other business as may be incidental to the above.

Form 38. Civil Engineering.

Carrying on the business of civil engineering and surveying, making plans and estimates of land and structures, including the development and application and use of the plans and surveys of the firm of A. and B., composed of A. and B., and the plans and surveys of A.

Form 39. Cloth.

Buying, selling, manufacturing and dealing in rubber, cotton, wool, silk, flax and all fibrous materials, and rubber, cotton, woollen, silk, flax and all fibrous goods and fabrics, and in goods and fabrics into which rubber, cotton, wool, silk, flax or any fibrous material enters as a component part, and the manufacture, repair, purchase, sale and dealing in machinery, tools, and appliances which are or may be used in buying, selling, manufacturing and dealing in said materials, goods and fabrics.

Form 40. Same.

Carrying on the business of manufacturing, producing, buying and selling and otherwise dealing in cotton, woollen and worsted goods and other fabrics and any materials, articles or things required for, in connection with or incidental to the manufacture, use, purchase, sale of or other dealing in cotton, woollen and worsted goods and other fabrics; and also for the purpose of acquiring, owning and disposing of the stock

and other securities of any corporation engaged in the business of selling, manufacturing or dealing in any of the articles or products above mentioned.

Form 41. Clothing.[22]

Manufacturing, buying and selling ready to wear garments for men, women and children.

Form 42. Same.

Carrying on the business of buying, selling and dealing in dry goods, including ladies' and children's clothing and specialties, and in other commodities dealt in by department stores so called.

Form 43. Same.

Men's and women's outfitters, including manufacturing, buying, selling and generally dealing in clothing, wearing apparel and men's and women's furnishings of all kinds, and all materials, supplies and all articles necessary or convenient for use in connection with said business or any part thereof.

Form 44. Same.

Manufacturing, buying, selling, producing, adapting, preparing and otherwise dealing in ladies' or children's underwear and also wearing apparel of whatsoever name and nature, and any articles or products in the manufacture or composition of which the same is or may be used, including the acquisition by purchase, manufacture or otherwise of all materials, supplies and other articles necessary or convenient for use in connection with said business or any part thereof.

Form 45. Coal, Lumber, etc.

The purchase, sale and transportation of coal, coke, wood and other fuels, lumber, hay, grain, lime, cement, stone and other property similar or incidental thereto and the acquiring by purchase or otherwise of the business and property of other persons engaged in similar pursuits.

[22] See also infra, Form 56.

Form 46. Co-operative Society.

Carrying on the trade of general dealers in household supplies on the co-operative plan; and (2) serving as a means of training the workers at industrial self-government, and agitating for the establishment of a universal co-operative commonwealth.

Form 47. Same.

Co-operative trade, on what is known as the Rochdale plan, in groceries, provisions, fuel, furniture, dry goods, clothing, and other household and personal supplies.

Form 48. Dairy.

To raise, purchase, sell and deal in cattle and other live stock; to produce, purchase and sell fresh milk, butter, oleomargarine, butterine, beef and all other food products; to manufacture and deal in condensed and all other manufactured forms of milk; to purchase, build and operate refrigerating plants, railroad cars and other vehicles for the transportation of dairy products; to lease, purchase and sell all machinery, apparatus and other articles used in connection with all or any of the purposes aforesaid.

Form 49. Decoration of Houses.

Carrying on the business of constructing, furnishing and decorating dwelling houses, and buildings of every description, manufacturing and dealing in furniture, furnishings, decorations, and materials of every kind for the construction, furnishing, or decorating of dwelling houses and buildings.

Form 50. Dental Supplies.

Manufacturing, buying, selling and dealing in dental supplies and other merchandise; of engaging in and carrying on the business of dentistry and every branch thereof; of printing and advertising, and doing all other acts incident to or connected with the business of dentistry, or any branch thereof, or of manufacturing, buying, selling or dealing in dental supplies or other merchandise.

Form 51. Department Store.

Buying and selling, wholesale and retail, of dry and fancy goods, boots and shoes, clothing, hardware, candies, millinery, cloaks, suits, furniture, carpets and upholstery goods, groceries, musical instruments, jewelry, and all other articles and goods appurtenant to a department store.

Form 52. Same — Longer Form.[23]

(1) To establish and conduct a general department store.

(2) To carry on all or any of the businesses of dry-goods merchants, cloth manufacturers, furriers, haberdashers, hosiers, manufacturers, importers, wholesale and retail dealers of and in textile fabrics of all kinds; milliners, dressmakers, mantua-makers, tailors, hatters, clothiers, furnishers, outfitters, glovers, lace manufacturers, feather dressers, boot and shoe makers; manufacturers and importers and wholesale and retail dealers of and in leather goods, household furniture, ironmongery, china and glassware, crockery and other household fittings and utensils, ornaments, bric-a-brac, stationery, notions, and fancy goods; dealers in meat and provisions, drugs, chemicals, and other articles and commodities of personal and household use and consumption; and generally of and in all manufactured goods, materials, provisions and produce.

(3) To carry on any of the businesses of coach and carriage builders, saddlers, harness-makers, house decorators, sanitary engineers, electrical engineers, and contractors, auctioneers, cabinet-makers, upholsterers, furniture removers, owners of depositories, warehousemen, carriers, storekeepers; manufacturers of and dealers in hardware, jewelry, plated goods, perfumery, soap, toilet articles of all kinds, and articles required for ornament, recreation, or amusement; gold and silversmiths; dealers in precious stones, watchmakers, newspaper proprietors, booksellers, dealers in musical instruments, manufacturers of and dealers in bicycles, tricycles, and motor carriages, and sporting goods of all kinds; and also refreshment contractors, restaurant keepers, wine and liquor dealers, tobacconists, and dealers in mineral, aerated, and other liquors; barbers and hairdressers,

[23] Taken from Dill on Corps. (4th ed.) 253.

farmers, dairymen, market gardeners, nurserymen and florists, photographers and dealers in photographic supplies, printers, lithographers and engravers, dealers in domestic, trained, and fancy animals.

(4) To buy, sell, manufacture, repair, alter, and exchange, let on hire, export, and deal in all kinds of articles and things which may be required for the purposes of any of the said businesses, or commonly supplied or dealt in by persons engaged in any such businesses, or which may seem capable of being profitably dealt with in connection with any of the said businesses.

(5) To provide and conduct refreshment-rooms, newspaper-rooms, reading and writing-rooms, dressing-rooms, telephones, and other conveniences for the use of customers and others.

(6) To grant to other persons or corporations the right or privilege to carry on any kind of business on the premises of the company on such terms as the company shall deem expedient or proper.

Form 53. Drugs.

Carrying on the general business of pharmacy and of pharmaceutical chemists, of buying and selling drugs and medicines, and goods of like nature, of buying and selling cigars and tobacco, and fancy goods usually carried in a drug store, and to do and perform any acts incidental thereto.

Form 54. Same.

The purpose for which the corporation is constituted is to buy, sell, manufacture and deal in all kinds of drugs and medicines and acquire apothecary stores, run the same and sell again, and also deal in all kinds of druggists' and apothecary supplies and fixtures.

Form 55. Same.

Carrying on the business of chemists and druggists, to buy, sell and compound medicines, drugs and proprietary articles, and to buy and sell other merchandise.

Form 56. Dry Goods.[24]

To manufacture, buy, sell, import, and export goods, wares and merchandise of every kind and description; to carry on a general retail and wholesale dry goods business; to sell dry goods on commission; to deal in dress goods of all kinds, white and colored, neckwear, gloves, all articles of cloth, linen, paper or leather used for clothing or ornament, household furnishings, glassware, china, pictures, bric-a-brac, and all articles of personal or household use.

Form 57. Electrical Engineering.

Carrying on the business of electricians and mechanical engineers and manufacturers of and dealers in all apparatus and things required for and capable of being used in connection with the generation, distribution, supply, accumulation and employment of electricity.

Form 58. Electrical Machinery.[25]

Carrying on the business of manufacturers and dealers in electric motors, dynamos and other electrical machinery, appliances and plants, and buying, selling, manufacturing, repairing, converting, altering, letting or hiring, and dealing in electrical appliances and goods of every kind and character, and machinery of all manner or kind.

Producing and accumulating electricity and electro-motive force, and supplying the same for the production, transmission or use of power for lighting, heating and motive purposes or otherwise, as may be thought advisable, and lighting streets, places and buildings, public or private, by means of electricity or otherwise, or enabling the same to be so lighted.

Form 59. Electrical Supplies.

Manufacturing, installing, buying, selling and in any way dealing in all kinds of appliances, machinery and supplies for electric heating and other electrical purposes, also of manufacturing, buying, selling and in any way dealing in wire, metals, enamel, india rubber, and any substitute therefor, and manu-

[24] See also supra, Forms 41–44.

[25] See also infra, Form 72.

factures of which one or more of said articles may form a part; and further for the purpose of transacting such other business as may be incidental to the foregoing.

Form 60. Engraving.

Doing business in printing, publishing, engraving and the like; of soliciting and placing advertising, and dealing in articles used in advertising, of manufacturing, buying, selling or otherwise dealing in materials necessary or appertaining to the proper conduct of said business, and generally of conducting in all its branches the business ordinarily carried on by those engaged in a printing and advertising business.

Form 61. Same.

To carry on the business of photo-engraving, illustrating, designing and engraving by chemical process for books, newspapers, magazines and other literary works; and for publications of whatever kinds and descriptions, for advertising and other purposes; to build, construct, purchase, hire or otherwise acquire or provide any workshops, copyrights, patents, offices, plant and machinery or other things necessary or for the purpose of carrying out the objects of the company.

Form 62. Express and Teaming.

Doing a general express and teaming business within the State of Massachusetts.

Form 63. Farming and Dealing in Produce.

To raise, produce, cultivate, prepare, buy, sell, manufacture and deal at wholesale and retail in garden, farm and dairy products of all kinds and any and all articles used or capable of being used in connection with said business or any part thereof.

Form 64. Foundry and Machine Shop.

Carrying on a general foundry and machine shop business, manufacturing and dealing in all kinds of metallic castings, machinery, pumps, capstans, winches, tools and all other goods,

wares, merchandise or articles made of brass, iron or other metals or any compounds thereof, doing all kinds of piping and plumbing, installing, altering and repairing all kinds of heating apparatus, and dealing in personal property of all kinds.

Form 65. Framing and Mirrors.

The corporation is constituted for the purpose of manufacturing and making various frames and glass; to sell at retail and wholesale mirror frames and glass, to take and execute contracts for the making, setting up, erecting and framing of mirrors, windows and any other work wherein mirrors, frames or glass are used or required. To manufacture and sell at wholesale and retail merchandise and to take and execute contracts for the sale of the same. To act as agents, factors and representatives for others in the sale of mirrors, frames, glass goods or other merchandise and for the purpose of doing any lawful business incidental to the purposes hereinbefore set forth.

Form 66. Furniture.

To manufacture, prepare, buy, sell, exchange, lease, hire, export, import and generally deal in, as principal or as agent, all kinds of modern and antique furniture, including tables, bureaus, chairs, sofas, sideboards, stoves, furnaces, carpets, rugs, oil-cloths, curtains, laces, embroideries, tapestries, pictures of all sorts, statuary, bric-a-brac, silverware, jewelry and works of art, glassware, and all kinds of articles intended to be used for furnishing or beautifying houses and buildings, public or private, grounds and gardens; to make valuations and appraisals of any articles, goods, wares or merchandise; to supply equipment and furnishings for buildings, gardens and grounds, and to act as interior and exterior decorators, and to supply all articles necessary for any of the above purposes.

Form 67. Gas-Making Machinery.

To manufacture and deal in machinery, apparatus and supplies appropriate and convenient to the manufacture, utilization and distribution of gas for lighting, heating, power, and other purposes; to use and deal in machinery and appliances

connected with such manufacture and sale; to carry on a general manufacturing business in articles not prohibited by law; to acquire, operate, and deal in such patents, patent rights, processes and inventions and interests therein and rights thereunder, as may be deemed essential in carrying on the business of the corporation; to license under such patents, and to lease such machinery and apparatus; to acquire, own, manage, lease and dispose of any real or personal property essential or convenient for such business; with all the rights which are granted by law to acquire, hold and dispose of the capital stock, bonds and other securities of other corporations; and generally to do all things necessary or incident to said business.

Form 68. Glue.

The manufacture and sale of glue and glue products. The mixing of the same with chemicals and other materials and dealing in said mixtures. The owning and buying and selling of formulas and patent processes for the manufacture of glue and the licensing of other persons and corporations to manufacture and deal in products under any mixture or patented formula.

Form 69. Hair-Dressing Supplies.

Buying, selling and dealing in soaps, cosmetics, hair and all materials, supplies and other articles necessary or convenient for use in connection with and in carrying on the hair dressing and manicure business.

Form 70. Hardware.

Purchasing, or otherwise acquiring, holding, owning, selling, assigning, transferring, investing, dealing in and dealing with iron, steel, heavy hardware, carriage hardware, carriage woodwork, lumber, and carriage and wagon supplies of every class and description, as principal, agent, contractor, or otherwise, in keeping or incidental to said business.

Form 71. Same.

The corporation is constituted for the purpose of manufacturing, buying and selling hardware, and all other articles

incident thereto, including carpenters' and machinists' tools, cutlery, wood, metals, electrical supplies, farming and mining tools and implements, paints, oils, and painters' supplies, sporting goods, agricultural implements, carriage hardware, wooden ware, machinery, mill supplies, glass ware, seeds, plumbing supplies, glass fixtures, doors, sashes, blinds, stoves, brushes, stable fixtures, steel, iron and brass.

Form 72. Heating Apparatus; Electric Fixtures.

The corporation is constituted for the purpose of manufacturing, buying, selling, installing, repairing and dealing generally in all kinds of apparatus for heating and cooking, and also all kinds of electrical fixtures, furnishings and devices for lighting and other purposes.

Form 73. Holding Company.

To acquire by purchase, subscription or otherwise, and to hold as investment any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the Commonwealth of Massachusetts or of any other state, territory or country.

To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the Commonwealth of Massachusetts, or of any other State, territory or country, and while owner thereof, to exercise all the rights, powers and privileges of ownership.

To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the Commonwealth of Massachusetts, or of any other state, territory, or country, and while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

To aid in any manner any corporation or association of which any bond or other securities or evidences of indebtedness or

stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

Form 74. Same.[26]

To purchase, receive, hold, and own bonds, mortgages, debentures, notes, shares of capital stock, and other securities, obligations, contracts, and evidences of indebtedness of any private, public, or municipal corporation, or of the Government of the United States or of any state, territory, or colony thereof, or of any foreign state or country; to receive, collect, and dispose of interest, dividends, and income upon, of, and from any of the bonds, mortgages, debentures, notes, shares of capital stock, securities, obligations, contracts, evidences of indebtedness, and other property held or owned by it, and to exercise in respect of all such bonds, mortgages, debentures, notes, shares of capital stock, securities, obligations, contracts, evidences of indebtedness, and other property, any and all the rights, powers, and privileges of individual owners thereof; to do any and all acts and things tending to increase the value of the property at any time held by the company; to issue bonds and to secure the same by pledges or deeds of trust or mortgages of or upon the whole or any part of the property held by the company, and to sell or pledge such bonds for proper corporate purposes, as and when the board of directors shall determine; and, in the promotion of its said corporate business of investment and to the extent authorized by law, to lease, purchase, hold, sell, assign, transfer, pledge, mortgage, and convey real and personal property of any name and nature; but nothing herein is to be construed as intended to form a banking company, a trust company, a savings bank, or a corporation intended as a part of its business to derive profit from the loan and use of money.

Form 75. Hotel.

To conduct a general hotel business; to import and export food products and hotel supplies; to conduct the business of a restaurateur; to hold and occupy under deed or lease such real estate as may be necessary for the conduct of such business.

[26] Taken from Dill on Corps. (2d ed.) 213.

Form 76. Ice.

To carry on the business of manufacturing, storing, buying, selling, distributing and generally dealing in ice, ice and other machinery, tools, implements, apparatus, appliances, processes, patented or otherwise, chemicals, patents, and any and all other articles or substances used or capable of being used in connection with said business or any part thereof.

Form 77. Incorporation Company.

To organize, incorporate and develop other corporations, to act as registrar and agent for the registering and transfer of stocks and bonds; to act as agent or trustee in the charge and management of real and personal property committed to it by deed of trust or otherwise; and to act as trustee under mortgages of real and personal property.

Form 78. Laundry.

To conduct and carry on the laundry business in all its branches; to manufacture, produce, prepare, adapt, buy and sell mill supplies of every nature (especially "size" and "slasheen") and all machinery, equipment and power convenient to the purposes aforesaid; to purchase, acquire, hold, lease and dispose of (1) any and all real and personal property, or any interest therein, useful or convenient to the purposes aforesaid, (2) the plant, property and business of persons and corporations engaged in a business similar to any hereby authorized, and (3) any and all patents and inventions covering or protecting any process, machinery, or item used in or in connection with the powers herein specified; to borrow money for any purpose of the corporation, and to engage, pledge and charge any part of or all of its property, whether now or hereafter acquired.

Form 79. Leather and Shoe Supplies.

Manufacturing and dealing in hides, skins and leather of all kinds, shoe materials and findings, also cut soles, other cut stocks and prepared stocks for the manufacturing of boots and shoes, and to exercise such mercantile powers as are necessary,

incidental and convenient to said business, and to buy, own and sell letters patent incidental and necessary thereto.

Form 80. Lumber.

To purchase, lease or otherwise acquire, and to sell timber, farming and grazing, mineral and other lands; to build, construct, maintain and operate works for the development of such lands; to raise, buy, sell and deal in trees, plants, shrubs and other vegetable products; and to manufacture lumber of all kinds.

Form 81. Machine Shop.

Carrying on a general foundry and machine shop business, manufacturing and dealing in all kinds of metallic castings, machinery, pumps, capstans, winches, tools and all other goods, wares, merchandise or articles made of brass, iron or other metals or any compounds thereof, doing all kinds of piping and plumbing, installing, altering and repairing all kinds of heating apparatus, and dealing in personal property of all kinds.

Form 82. Manufacturing — General Form.

To purchase, lease, or otherwise acquire lands and buildings in.....or elsewhere for the erection and establishment of a manufactory or manufactories and workshops, with suitable plant, engines and machinery, with a view to manufacture, purchase, sell or otherwise deal in....., either directly or indirectly, through the medium of agents or otherwise; in particular to acquire the business now carried on by ....., with the land and buildings, plant, stock and other properties connected with the business, and also the goodwill of the said business, and the benefit of all pending contracts, and the stock-in-trade thereof, together with the patents and other rights and privileges relating to said business, vested in or held on behalf of them; to purchase or otherwise acquire patents, patent rights and privileges, improvements or secret processes for or in any way relating to all or any of the objects aforesaid, and to grant licenses for the use of, or to sell or otherwise deal with any patents, patent rights and privileges,

improvements or secret processes acquired by the company; to sell, lease or otherwise deal with real and personal property of the company.

Form 83. Market.

Maintaining a market for the purchase, sale and delivery of meats, poultry, game, vegetables, groceries and all kinds of food supplies and the acquisition of all tools, implements, and paraphernalia and real estate necessary for said purposes.

Form 84. Mercantile Agency.

To establish and operate a mercantile agency in all parts of the world, and in connection therewith to acquire and to sell, or in any other way dispose of, information and statistics of every kind relating to the business affairs, credit, and character of individuals, partnerships, associations and corporations; to establish and operate an agency for the collection of debts, obligations and claims of every nature, and to enforce payment thereof by any kind of legal process, and to make contracts securing the faithful performance of any mercantile agreement and for the prompt payment of any debt or obligation; to acquire, by purchase or otherwise, and to establish and maintain a general printing, publishing, book binding and advertising business; to prepare and distribute books, newspapers, magazines, pamphlets and all printed matter dealing with mercantile reports and ratings, and other matters of interest to lawyers, bankers, merchants and business men.

Form 85. Metals.

Manufacturing sheet copper and tin, sheet iron and steel into various shapes and doing a general merchandise business in sheet metals.

Form 86. Mining.

To locate, prospect, mine, develop and operate placer and quartz mines, and to extract gold, silver and other metals and minerals therefrom; and to buy, sell and otherwise deal in and market said ores and ores of a similar character and the metals and minerals extracted therefrom.

To erect, maintain and operate plants, mills, smelters, furnaces, buildings of all kinds, and other apparatus and appliances necessary and incident to the mining, milling and smelting business.

To acquire, purchase, lease, mortgage, sell, convey and otherwise deal in mines and mining properties, mills, smelters and other reduction machinery and appliances; and all kinds of real and personal property necessary and incident to the performance and fulfilment of the above named purposes.

Form 87. — Same.

To promote, purchase, lease, acquire, develop, operate, sell and deal in, in any part of the United States of America and of Canada, Mexico and other foreign countries, mines and quarries of all kinds and any interests therein, and any and all products thereof; to mine, mill, reduce, smelt, manufacture, prepare for market, buy and sell merchandise in copper, gold, silver and other ores, and also copper, gold, silver and other metals and metallic compounds, coal, coke, charcoal and other fuels, and all products and by-products, mediates and immediates, of all ores and minerals, but not to buy gold or silver bullion or foreign coins.

To promote, purchase, lease, acquire, develop, build, construct, repair, enlarge, extend, improve, equip, complete, maintain and operate, rent or sell outside the limits of this state, tunnels, shafts, conduits, water courses, docks, wharves, reservoirs, dams, hydraulic works, water works, gas works and oil wells, coking and charcoal plants, car, engine and machine works, mills, factories, furnaces, reduction works, smelters, shops, warehouses, hotels, dwellings and other houses, buildings, structures, conveniences and establishments.

Form 88. — Same, with Large General Powers.

The purposes of said corporation are the carrying on, in any part of the United States of America, or in any foreign country, and especially in the United States of Mexico, the businesses hereinafter named, to wit: to carry on the business and license others to carry on the business of mining, quarrying, smelting,

refining, dressing, milling, cyaniding, amalgamating and preparing for market gold, silver, copper, lead, zinc and all sorts of ore and metal, mineral substances and stone; extracting by any method whatsoever value from all kinds of ores and manufacturing said ores, metal, mineral substances and stone, and all products thereof, into all sorts of merchantable forms, articles and things; and producing, buying, selling and dealing in such ores, metals, mineral substances and stone, and all products of the same; to purchase, lease, or acquire by license, concession, grant, location, or otherwise, any lands, mines, mining claims, mineral rights, buildings, easements, rights and privileges, machinery, plant and other effects whatsoever which the company may from time to time think proper to be acquired for any of its purposes; to erect, construct, operate and maintain any mills, concentrators, smelters, and any and all machinery necessary for the operation of mines and for the treatment of ores or other business of the company; to construct and maintain roadways, bridges, canals, aqueducts, dams, and sluiceways, incidental to or convenient in connection with the company's business; to acquire, own, lease, manage, operate, control and dispose of water, water rights and privileges; to acquire by purchase, lease, location or otherwise, timber and timber lands and to convert said timber into marketable lumber for mining and other purposes and to sell or dispose of said lumber; to engage in, conduct and carry on a wholesale and retail mercantile business, to own, lease, manage, and operate boarding houses, hotels, restaurants, and tenements; to manufacture, buy, sell and deal in drills, derricks, mills and mining and building implements, tools, machinery, materials and supplies of every description; to hold, own and dispose of all kinds of property, both real and personal, including patents, patent rights, and rights and properties of a similar nature; to construct, maintain and operate outside of the Commonwealth of Massachusetts railroads and tramways for the carriage of passengers and merchandise and telephone and telegraph lines in connection with said railroad and tramway lines, and to purchase or lease and maintain and operate any railroad or tramway whether now or hereafter

constructed or operated, and to acquire, lease, sell or otherwise dispose of lands, rights, rolling stock, engines and other equipment for said railroads, tramways, telegraph and telephone lines; to construct, acquire, own or lease and operate, sell or otherwise dispose of plants and machinery, apparatus and appliances for the production, distribution and supply of gas and electricity for lighting and heating, and for the supply of electricity, steam, water and air, for power or other purposes, and for the supply of refrigeration and the manufacture and distribution of artificial ice; to acquire by purchase, subscription or otherwise, to hold as investment, and to sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds or other securities or evidences of indebtedness or shares of the capital stock created or issued by any other corporation or association of the Commonwealth of Massachusetts or of any other state, territory, or of the United States of Mexico or any other foreign country, and while owner thereof to exercise all the rights, powers and privileges of ownership, including the right to vote on any stock so held; to aid, by guaranty of the principal or interest, of any of its securities, or in any other manner, any corporation or association of which any bond or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock; to issue any and all bonds convenient for the business of this corporation, and to secure the same by mortgage, deed of trust, or any other form of conveyance; to sell, lease, or in any manner lawful for individuals to dispose of any or all the property or rights of the corporation; to acquire and undertake the whole or any part of the business, property, assets and liabilities of any person, firm or corporation engaged in a business similar to that herein provided for, or capable of being conveniently carried on in connection with the business above described, and to unite or consolidate with any other similar corporation or corporations, in such manner as may be lawful; to do all or any part of the above things as principals, agents, contractors or otherwise, and by or through

trustees, agents or otherwise, and either alone or in conjunction with others; and to do any and all things incidental to, or convenient for, the prosecution of the purposes herein contained, or any of them, and not inconsistent with the laws of the Commonwealth of Massachusetts; and to have and to exercise all the rights, powers and privileges appertaining to corporations under the general laws of the Commonwealth of Massachusetts.

Form 89. Newspaper and Publishing.[27]

To acquire, print, publish, conduct and circulate, buy, sell or otherwise deal with any newspaper or newspapers, magazines, books or other publications or literary undertakings, and generally to carry on the business of newspaper proprietors and general publishers; to carry on if and when it shall seem desirable, the trade or business of general printers, lithographers, engravers and advertising agents, book sellers, book binders, stationers, photographers, photographic printers, stereotypers, electrotypers, or any other business or manufacture that may seem expedient; to undertake and transact all kinds of business relative to the gathering and distribution of information of every sort and kind to the same extent that a natural person might or could do; to build, construct, erect, purchase, hire, or otherwise acquire or provide any buildings, offices, workshops, plant and machinery or other things necessary or useful for the purpose of carrying out the objects of the company.

Form 90. Paints.

Manufacturing, importing, buying, selling, and doing a general jobbing and retail business in paints, varnishes, linseed and burning oils, shingle stains, window glass and brushes, and any articles pertaining to the interior decoration of cottages and houses.

Form 91. Plumbing and House Furnishing.

Engaging in a general plumbing, heating, tin smithing and kitchen and household furnishing business, and as incident thereto to buy, sell, manufacture, import, export and deal in

[27] See infra, Forms 97 and 98.

all kinds of plumbing and heating apparatus, hardware, glass ware, tinware and wooden ware, and any and all kinds of furniture and furnishings for household and similar uses; to buy, sell, manufacture and deal in material, machinery and other implements used in the above described business; to own, operate, sell, lease, buy and otherwise acquire inventions, patents, trade marks and other rights incident to and useful in said business; and to do all and everything necessary, suitable, or convenient for the carrying on of said business as above defined, or for the accomplishing of the purposes or objects herein set forth.

Form 92. Printing and Publishing.[28]

To carry on the business of printers, stationers, engravers, book printers, designers, dealers in paper and all fancy articles, book sellers, publishers, advertising agents, buyers and sellers of newspapers and publications of all kinds and dealers in any other articles or things of a character similar or analogous to the foregoing or any of them or connected therewith; To carry on a general advertising business in all its branches both as principals and agents; To carry on if and when it shall seem desirable the trade or business of general printers, lithographers, engravers and advertising agents; To build, construct, erect, purchase, hire or otherwise acquire or provide any buildings, offices, workshops, plant and machinery or other things necessary or useful for the purpose of carrying out the objects of the company; To manufacture, purchase, or otherwise acquire, hold, own, mortgage, sell, assign, invest, trade, deal in and deal with goods, wares and merchandise, and property of every class and description; To acquire the good will, rights, property and assets of all kinds, and to undertake the whole or any part of the liabilities of any person, firm, association or corporation and to pay for the same in cash, stock, bonds, debentures or other securities of this corporation or otherwise. To purchase, hold and reissue the shares of its own capital stock. To do any or all of the things herein set forth to the same extent as natural persons might or could do and in any part of the world.

[28] See also supra, Forms 60, 61, 89; and infra, Forms 97, 98.

Form 93. Promotion.

To carry on and undertake any business, undertaking, transaction or operation commonly carried on or undertaken by capitalists, promoters, financiers, contractors, merchants, commission men and agents, and in the course of such business to draw, accept, endorse, acquire and sell all or any negotiable or transferable instruments and securities, including debenture bonds, notes and bills of exchange.

To issue on commission, subscribe for, acquire, hold, sell, exchange and deal in shares, stocks, bonds, obligations or securities of any public or private corporation, government or municipality, and the company shall have express power to hold, purchase or otherwise acquire, to sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock, bonds, debentures or other evidences of indebtedness created by any other corporation or corporations, and while the owner thereof to exercise all the rights and privileges of ownership, including the right to vote thereon.

To form, promote and assist financially or otherwise, companies, syndicates, partnerships and associations of all kinds, and to give any guarantee in connection therewith or otherwise for the payment of money, or for the performance of any obligation or undertaking.

To acquire, improve, manage, work, develop, exercise all rights in respect of, lease, mortgage, sell, dispose of, turn to account and otherwise deal with property of all kinds, and in particular business concerns and undertakings.

Form 94. Provisions.

Carrying on a wholesale and retail provision, produce and grocery business and doing all things necessary or incidental thereto or connected therewith.

Form 95. Provisions and Slaughtering.

Manufacturing, buying and selling provisions and other articles and merchandise commonly manufactured, bought or sold by packing or provision houses, and slaughtering cattle, swine, sheep and other animals used for food.

Form 96. Same — Longer Form.

To carry on a meat and provision and general mercantile business, and particularly to purchase, sell, and generally deal in game, fish, poultry, meats, live stock, and animal products, and manufactured or prepared articles, goods, and merchandise produced or resulting from or embodying, in whole or in part, slaughtered live stock, agricultural products, or any of the above-named products whatsoever, and to carry on the above business and do the above things, both at wholesale and retail, as owners, commission merchants, factors, agents, brokers, dealers, and in every other capacity whatsoever; to lease, purchase, acquire, hold, erect, equip, operate, and maintain packing houses, cold storage and other warehouses, slaughter houses, stockyards, and such other real and personal property as the laws of the Commonwealth of Massachusetts allow and the company may think necessary or convenient for the purposes of its business; to purchase, acquire, sell, or otherwise dispose of good will, rights, property, and assets of all kinds; generally to carry on any other business which may seem to the company capable of being conveniently carried on in connection with any of the above purposes or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights so far as the same shall be permitted by the laws of the Commonwealth of Massachusetts; and, pursuant thereto, to subscribe for, purchase, invest in, hold, own, assign, pledge, or otherwise dispose of shares of capital stock, bonds, mortgages, debentures, notes, and other securities, obligations, contracts, and evidences of indebtedness of any corporations carrying on any business which the company itself can lawfully engage in.

Form 97. Publishing.

Carrying on the business of printing and publishing newspapers, periodicals, books, pamphlets, book binding and doing a general job printing and publishing business; also dealing in printers' supplies and paper, card board and stationery of all kinds.

Form 98. Same.

To publish, print, bind, manufacture, issue, purchase, sell, deal in and otherwise turn to account books, magazines, publications, newspapers, pamphlets, maps, charts, engravings, lithographs, etchings, wood-cuts, electrotypes, stereotypes, photographic prints, photo-lithographs, pictures and illustrations whether colored or without color, and by whatsoever process or processes the same may be produced, whether now existing or hereafter to be discovered or invented; and, generally, to carry on the business of printers, binders, lithographers, stereotypers, engravers and publishers, in any and all of the states, territories, colonies, dependencies and districts of the United States of America and in any and all foreign countries.

Form 99. Quarrying.

Quarrying, manufacturing, buying, selling and dealing in slate, and buying, leasing, operating and selling slate quarries.

Form 100. Same.

Quarrying, working, handling, and selling granite and other stone, and contracting for the construction of buildngs and structures composed in whole or in part of granite or other stone.

Form 101. Same.

To carry on the business of quarrying, cutting, polishing, and finishing granite or other stone, buying and selling granite, marble and stone of all kinds, including the acquisition by purchase, manufacture or otherwise of all machinery, tools, implements, ways, materials, supplies and other articles necessary or convenient for use in connection with said business or any part thereof.

Form 102. Real Estate.[29]

To acquire by purchase, lease, exchange, hire or otherwise, lands or any interest therein; to erect and construct houses,

[29] See also supra, Form 36; infra, Forms 108 and 109. Corporations to buy and sell real estate in this commonwealth cannot be formed under this act, but must be organized under other acts. See St. 1903, c. 437, § 7, and R. L., c. 123.

buildings or works of every description on any land of the company, or upon any other lands, and to rebuild, enlarge, alter and improve existing houses, buildings or works thereon to convert and appropriate any such land into and for roads, streets and other conveniences, and generally to deal with and improve the property of the company; to sell, lease, let, mortgage or otherwise dispose of the lands, houses, buildings and other property of the company; to undertake or direct the management and sale of the property, buildings and lands; to transact on commission the general business of a real estate agent.

Form 103. Same.

To take, acquire, buy, hold, own, maintain, work, develop, sell, convey, lease, mortgage, exchange, improve and otherwise deal in and dispose of real estate and real property or any interest and rights therein, without limit as to amount; to take, acquire, buy, hold, own, sell, hire, lease, mortgage, pledge and otherwise deal in and dispose of all kinds of property, chattels and chattels real, without limit as to amount; to lend money on bonds secured by mortgages on real estate or upon personal property, or to lend money and make advances from time to time on bonds secured by mortgages for future advances on real estate or upon personal property; to acquire by purchase, lease, exchange, hire or otherwise, lands or any interest therein; to erect, construct, alter, maintain and improve houses, buildings or works of other description or any lands of the corporation, or upon any other lands, and to rebuild, alter and improve existing houses, buildings or work thereon; to convert and appropriate any such lands into and build and form roads, streets or other conveniences, and generally to deal with and improve the property of the corporation; to sell, lease, let, mortgage or otherwise dispose of the lands, houses, buildings and other property of the corporation; to undertake and direct the management of all property, buildings and lands of the corporation, or otherwise; to transact on commission, the general business of a real estate agent.

Form 104. Ship-Building.

Building and repairing ships and engines and furnishing wharfage and dockage.

Form 105. Theatrical Business.

The corporation is constituted for the purpose of carrying on a general theatrical and show business and producing and exhibiting scenic, dramatic, musical, operatic, athletic, literary and vaudeville productions, and entertainments and contracting and negotiating for the same; also of printing and advertising, and manufacturing, buying, and selling goods, wares and merchandise, and especially all things pertaining to the theatrical and show business.

Form 106. Same.

Carrying on a general animal exhibition, theatrical and show business and producing and exhibiting animal shows, scenic, dramatic, musical, operatic, athletic, literary and vaudeville productions and entertainments, and contracting and negotiating for the same; also of buying, selling, breeding, raising and dealing in animals; also of printing and advertising and manufacturing, buying, and selling goods, wares and merchandise, and especially all things pertaining to animal exhibition, theatrical and show business.

Form 107. Title Insurance.

For furnishing abstracts of titles to real estate, and certifying to the correctness thereof.

Form 108. Warehouse and Realty.[30]

For the purpose of taking on storage, property, goods, wares and merchandise; and of having also safe deposit vaults, so called, for the storage of securities and property, to purchase, hold and occupy real estate, by grant or by lease, (for the purpose of carrying on its business), and for the purpose of transferring property to and from any building or premises occupied, controlled, or leased to or by the corporation or

[30] See supra, Forms 36 and 102. See also following note.

elsewhere; and for the purpose of conducting sales of personal property on its premises at public or private sale, whether as agent or broker or otherwise, and for the purpose of hiring, leasing and sub-letting the lands, buildings, wharves and docks for its own use or benefit or profit, to sub-lease and sub-let to any other party or parties and to negotiate and sell leases for others of lands, buildings, wharves and docks within said Commonwealth or the other States of the United States.

Form 109. Wharf and Realty.[31]

To acquire, hold, rent, lease, improve and convey lands and lands under water and riparian, dock and maritime rights, to construct docks, dry docks, wharves, piers, basins, derricks, elevators, warehouses, manufactories, stores, shops, tracks and other structures thereon, and to rent, lease and convey the same; to buy, sell, store, manufacture, import and export merchandise, machinery and products, and to build, own, repair and charter ships and vessels, afford them dockage, to commission, own, buy and sell ships and vessels, and generally to carry on a land improvement, real estate, dock, shipping and merchandising business.

(4) *By-Law Provisions.*

Form 110. By-Laws for a Small Corporation.

ARTICLE I.

NAME AND SEAL.

The corporation shall be known by the name of..... ..... It shall have a corporate seal bearing the name of the corporation, and such other device or inscription as the Board of Directors may determine. The Board of Directors may change the form of the seal and the inscription thereon at any time.

[31] See supra, Forms 36, 102 and 108. Corporations to buy and sell real estate in this commonwealth cannot be formed under this act, but must be organized under other acts. See St. 1903, c. 437, § 7, and R. L., c. 123.

ARTICLE II.

OFFICERS.

The officers of this corporation shall be a board of directors (consisting of three stockholders), a president, a vice-president, a clerk and a treasurer, all of whom excepting the president shall be chosen by ballot annually, at the first meeting of the corporation and at each annual meeting therafter, and one of said board of directors shall be chosen president by the said directors, and all the said officers shall hold their respective offices until others are chosen and qualified in their stead. If any director shall cease to be a stockholder his said office becomes vacant. In case of a temporary absence of any of said officers the directors may appoint a person to perform the duties of such officer during such absence. In case a vacancy shall occur in any of said offices, it may be filled at a special meeting of the stockholders, and until it shall be so filled by them the directors may appoint a person to perform the duties incident to the office until the same shall be filled by the stockholders.

ARTICLE III.

DIRECTORS.

The directors shall have all the powers usually vested in a board of directors of a business corporation. They shall have the general direction, control and management of the property and business of the corporation. They shall have ample power to purchase and to lease, pledge and sell all such personal property and to make all such contracts and agreements in behalf of the corporation as they may deem needful or convenient for the successful prosecution of its business and operations. They shall employ and at their pleasure remove all such persons and agents as they may deem necessary or proper for conducting the business of the corporation, and shall determine the compensation and the duties (in addition to those fixed by the by-laws) of all the officers, agents, clerks and servants of the corporation, and generally do all such lawful acts and adopt all such lawful measures, consistent with the by-laws of the corporation, as they shall deem best calculated to promote to the fullest extent the interests of the stockholders.

ARTICLE IV.

PRESIDENT.

The president shall preside at all meetings of the stockholders and of the directors, and shall with the treasurer sign all certificates of stock issued by the corporation.

ARTICLE V.

CLERK.

The clerk shall be sworn each year to the faithful discharge of his duties and a record of the oath with the evidence thereof shall be made by him upon the records of the corporation. He shall attend the meetings of the stockholders and of the directors, and shall record upon the book of records of the corporation the proceedings of the stockholders and of the board of directors at their respective meetings. He shall have the custody of the certificate and transfer books and stock ledger of the corporation, and shall record all transfers of shares in the corporation. He shall notify the stockholders and directors of their respective meetings in accordance with the by-laws of the corporation, and shall perform such other duties as the directors shall from time to time prescribe.

ARTICLE VI.

TREASURER.

The treasurer shall give bond to the corporation, if required by the directors, in such sum and with such sureties as they may require for the faithful performance of his duties. He shall be subject to such conditions and restrictions as may be made by the directors, have the custody of all moneys, debts, obligations, contracts, documents and other papers belonging to the corporation and of its common seal, and shall safely keep the same, and shall collect all moneys from time to time due and owing to the corporation, and disburse the same pursuant to the contracts and obligations of the corporation or the order of its board of directors or of the stockholders. Together with the president he shall sign all certificates of stock issued by the corporation. The treasurer shall have the sole and exclu-

sive right to make, sign, endorse and accept for and in the name and behalf of the corporation, promissory notes, drafts and checks, and then only in the regular course of its business. He shall execute and deliver in behalf of the corporation, all such instruments under its common seal as may be ordered by the stockholders or directors, unless their execution and delivery is otherwise provided for by vote, and shall affix the common seal to all certificates of stock issued by the corporation, and shall perform such other duties as the directors may from time to time require.

ARTICLE VII.

MEETINGS OF DIRECTORS.

The meetings of the directors shall be held as often as the needs of the corporation may in their opinion require, and may be called by the president or treasurer or any director; and the clerk shall notify the directors of such meeting whenever requested in writing by the president, treasurer or the director calling such meeting. A notice in writing, mailed postage prepaid, forty-eight hours before the meeting, addressed to each director at his usual place of business or abode or delivered to him in hand shall be sufficient notice of the meeting. Notice of any meeting may be dispensed with if each director by a writing filed with the records of the meeting waives such notice.

ARTICLE VIII.

THE NOTICE OF STOCKHOLDERS' MEETINGS.

Notice of all meetings annual and special of the stockholders shall be given to each stockholder by leaving such notice with him or at his residence or usual place of business, or by mailing the same, postage prepaid, addressed to him at his address as it appears upon the books of the corporation, seven days at least before the time of such meeting. Notice of any regular or special meeting may be dispensed with if every stockholder or his attorney thereunto authorized by a writing filed with the records of the meeting waives such notice.

ARTICLE IX.

QUORUM.

At any meeting of the stockholders, the stockholders having a majority of the shares of the capital stock represented in person or by proxy shall constitute a quorum for the transaction of business provided that not less than two stockholders, shall be personally present. At any meeting of the board of directors, two directors shall constitute a quorum.

ARTICLE X.

STOCKHOLDERS' MEETINGS.

An annual meeting of the stockholders shall be holden on the first Monday of ..... and in each year thereafter at ten o'clock in the forenoon at the office of the corporation in ....., Massachusetts. The fiscal year of the corporation shall end with.....30th of each year.

Special meetings of the stockholders may be called by the president or by a majority of the directors, and shall be called by the clerk upon written application of three or more stockholders who are entitled to vote and who hold at least one-tenth part of the interest in the capital stock, stating the time, place and purpose of the meeting.

ARTICLE XI.

VOTES AND PROXIES.

At all meetings of the stockholders, each stockholder shall be entitled to one vote for each share of stock held by him, and absent stockholders may vote and be represented by their lawfully constituted proxies.

ARTICLE XII.

ADJOURNMENT.

All meetings of the stockholders may be adjourned to any other time or place as may be decided by those present and represented, and it shall not be necessary to notify any stockholders of any adjournment of any such meeting. Any busi-

ness which could have been legally transacted at any meeting of the stockholders may be transacted at any adjournment thereof without new notification.

ARTICLE XIII.

CERTIFICATES.

All certificates of shares of the capital stock of the corporation shall be numbered progressively from the first, and shall be signed by the president and treasurer, and bear the seal of the corporation, and shall set forth the names and residences of the respective stockholders, and, except so far as prescribed by law, shall be in such form as the directors shall determine.

ARTICLE XIV.

TRANSFER OF STOCK.

All shares of stock of the Company shall be transferable only on the books of the company by the holder thereof in person, or by attorney duly authorized in writing and upon the surrender and cancellation of the certificates therefor duly endorsed.

ARTICLE XV.

ALTERATION OF BY-LAWS.

Any of these by-laws may be amended, repealed or changed, by a vote of the stockholders holding a majority of the shares of the capital stock of said corporation represented in person or by proxy at any annual or special meeting of the stockholders. In the notice of such special meeting it shall be stated that the amendment, repeal or change of the by-laws may be acted upon.

Form 111. Same — Longer Form.

ARTICLE I.

NAME, LOCATION AND CORPORATE SEAL.

SEC. 1. The name of the corporation is..... Company.

SEC. 2. The principal office of the corporation shall be located at.....in the Commonwealth of Massachusetts. The

corporation may have branch offices at such other place or places as the Board of Directors may from time to time determine upon.

Sec. 3. The corporate seal shall consist of a circular die bearing the words "..... Company, incorporated, Massachusetts, 19.." and such other device or inscription as the directors may determine upon. The form of the seal may be changed by the board of directors whenever they shall so order.

ARTICLE II.

MEETINGS OF STOCKHOLDERS.

Sec. 1. The annual meeting of the stockholders shall be held at the principal office of the corporation at..... o'clock in the afternoon of the last Monday in April of each year for the election of a board of directors, treasurer, and clerk, and the transaction of such other business as may come before the stockholders for action.

Sec. 2. The annual meeting of the corporation shall be called by written or printed notice stating the place, date, hour, and purpose thereof, which notice shall be given by the clerk at least seven days before such meeting to each stockholder by leaving such notice with him or at his residence or usual place of business or by mailing it, postage prepaid, and addressed to each stockholder at his address as it appears upon the books of the corporation.

Sec. 3. Special meetings of the stockholders may be called by the president, or by a majority of the directors and shall be called by the clerk upon the written application of three or more stockholders who are entitled to vote and who hold at least one-tenth part in interest of the capital stock, stating the time, place, hour, and purpose of the meeting.

Sec. 4. Notice of the time, place, and purpose of any regular or special meeting of the stockholders shall not be required if every stockholder, or his attorney thereunto authorized by writing which is filed with the records of the meeting waives such notice.

SEC. 5. A majority in interest of all stock issued and outstanding and entitled to vote shall constitute a quorum for the transaction of any business. Though less than a quorum be present, any meeting, annual or special, may, without further notice, be adjourned to a subsequent date or until a quorum be had.

SEC. 6. Stockholders who are entitled to vote shall have one vote for each share owned by them. Stockholders may vote either in person or by proxy. No proxy which is dated more than six months before the meeting named therein shall be accepted and no such proxy shall be valid after the final adjournment of such meeting.

ARTICLE III.

OFFICERS AND THEIR ELECTION.

SEC. 1. The officers of the corporation shall be a board of three directors, a president, treasurer, clerk, and such other officers as the board of directors deem advisable.

SEC. 2. The directors shall be stockholders and the president shall be a director and a stockholder. No other officers need be stockholders or directors.

SEC. 3. The board of directors, the treasurer, and the clerk shall be elected annually by the stockholders by ballot. The president shall be elected annually by and from the board of directors. The manner of choosing and appointing all other officers and agents shall be at the discretion of the board of directors.

SEC. 4. All officers shall hold office one year and until their successors are chosen and qualified.

SEC. 5. Vacancies in any office shall be filled by the board of directors.

ARTICLE IV.

BOARD OF DIRECTORS.

SEC. 1. The board of directors shall meet as often as the needs of the corporation may require. They may fix the time and manner of giving notice of the meeting and may determine the form and contents of the notice to be given. Any meeting

of the board of directors shall be a legal meeting if each director, by a writing which is filed with the records of the meetings, waives such notice. Unless otherwise specified in the notice, any and all business may be transacted at any meeting of the board.

Sec. 2. A majority of the board of directors shall constitute a quorum. Though less than a quorum be present, any meeting may, without further notice, be adjourned, to a subsequent date or until a quorum be had.

Sec. 3. The board of directors shall have the control and management of the business and property of the corporation and also shall have and exercise all the powers conferred upon them or set forth in the charter of the corporation, any general laws, or these by-laws. Without in any manner limiting the general powers otherwise conferred, it is hereby expressly declared that the board of directors shall have the following powers:

(A) To purchase, lease, or otherwise acquire for the corporation any or all rights, privileges, franchises, or property, whether real or personal, business, good will, fixtures, patents, and interests thereunder, whenever they, in their judgment, deem it beneficial for the purposes of the company and which the corporation is authorized to acquire, and to pay for the same either wholly or partially in money or in stocks, bonds, debentures, or other securities of the corporation, or on such terms and conditons and for such consideration as they may think fit.

(B) To sell, let, mortgage, consolidate, merge, dispose of, or otherwise deal with all[32] or any part of the property or rights of the corporation on any terms deemed expedient when, in their opinion, the interests of the corporation would be best protected thereby, and to have power to accept as the consideration other rights or property or any shares, bonds, or other obligations of any other company, corporation, association, joint stock company, person, firm, society, or body politic.

[32] This form has been approved by the commissioner of corporations, but query how far this clause conflicts with § 40 of the act, providing for a two-thirds vote of the stockholders in disposing of all assets.

(C) To borrow or raise money when they deem it necessary and to issue any or all bonds, debentures, or any obligations convenient for the business of the corporation and secure the same by mortgage, pledge, deed of trust, or in any other manner on all or any property of the corporation present or after acquired, and to draw, make, accept, endorse, discount, execute, and issue contracts, promissory notes, bills of exchange, warrants, and negotiable and transferable instruments.

(D) To hold their meetings, to have one or more offices, and to keep the books of the corporation outside of the Commonwealth of Massachusetts, at such place or places as they may from time to time fix upon. Such books and records as may be required by the laws of the Commonwealth of Massachusetts shall be kept within said Commonwealth.

(E) From time to time to provide for the management of the affairs of the corporation in such manner as they may think fit and in particular, from time to time, to delegate such power and authority as the laws of the Commonwealth of Massachusetts will permit to any committee, officer, or agent.

(F) At their discretion, to appoint and remove managers, subordinate assistants, committees, clerks, agents, servants, employees, permanent or temporary, fill vacancies in their positions and determine their duties and fix and from time to time change their salaries or compensation and require security consistent with the other provisions of these by-laws. The board may, in its discretion, invest any officer or committee of the corporation with any or all of the powers in this section contained.

(G) To determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders; and no stockholders shall have any right to inspect any account or book or document of the corporation except as conferred by statute or authorized by the board of directors or by resolution of the stockholders.

ARTICLE V.

PRESIDENT AND VICE-PRESIDENT.

Sec. 1. The president shall have the powers and duties usual to his office subject to any provisions contained elsewhere in these by-laws concerning his powers and duties. He shall, when present, preside at all meetings of the stockholders and directors.

Sec. 2. The vice-president, if one be elected by the board of directors, shall have all the powers and duties of the president in case of the absence, death, resignation, or disabilty from any cause of the president.

ARTICLE VI.

TREASURER.

Sec. 1. The treasurer shall have the powers and duties usual to his office subject to such conditions and restrictions as may be made by the directors and to any provisions contained elsewhere in these by-laws concerning his powers and duties. He shall give a bond to the corporation, if required by the directors, in such sum and with such sureties as they may require, for the faithful performance of his duties. He shall keep accurate books of account which shall always be open to inspection by the directors at his office during business hours, and he shall render to them at the annual meetings of the board, or whenever the directors may require, a brief statement of the financial condition of the corporation and he shall also present to the stockholders at their annual meeting a report giving the receipts and disbursements of the preceding fiscal year and the then financial condition of the corporation.

ARTICLE VII.

CLERK.

Sec. 1. The clerk shall be sworn each year to the faithful discharge of his duties and a record of the oath with the evidence thereof shall be made on the records of the corporation. He shall attend the meetings of the stockholders and of the directors and shall record the proceedings thereof. He shall

notify the stockholders and directors of their respective meetings in accordance with the by-laws of the corporation, and shall perform such other duties as the board of directors from time to time may prescribe.

SEC. 2. In the absence of the clerk at a meeting, a clerk *pro tempore* may be chosen, who shall be duly sworn.

ARTICLE VIII.

STOCK AND STOCK CERTIFICATES.

SEC. 1. Stock certificates shall be signed by the president and treasurer and sealed with the corporate seal.

SEC. 2. In case of the loss or destruction of a certificate, another may be issued in its place upon proof of such loss or destruction and the giving of a bond of indemnity or other security satisfactory to the board of directors but not to exceed double the market value of the stock.

SEC. 3. The stock transfer books shall be closed for meetings of stockholders and for the payment of divdends during such periods as from time to time may be fixed by the board of directors. During such periods no stock shall be transferable.

SEC. 4. The board of directors may appoint any reliable bank or trust company the transfer agent and the registrar of certificates of stock of this corporation and may require that all certificates of stock shall bear its or their signature.

ARTICLE IX.

FISCAL YEAR.

SEC. 1. The fiscal year of the corporation shall be from April first to March thirty-first in each year, beginning with 19...

ARTICLE X.

AMENDMENTS.

SEC. 1. These by-laws may be altered, amended, or repealed by a majority vote of a quorum as herein defined at any annual or special meeting of the stockholders provided the notice of such proposed alteration, amendment, or repeal, is given in the call for the meeting.

Form 112. Preferred Stock — Cumulative Dividends.

That the total amount of the capital stock of said company is five million dollars, the number of shares into which the same is divided is fifty thousand, and the par value of each share is one hundred dollars.

That of this amount one-half will be general stock and one-half preferred stock, and that the holders of such preferred stock shall be entitled to receive from the surplus or net profits arising from the business of the corporation a fixed yearly dividend of seven per centum, payable semi-annually on the 2d days of January and July in each year, before any dividend shall be set apart or paid on the said general stock.

Should the surplus or net profits arising from the business of the corporation, prior to any dividend day, be insufficient to pay the dividend upon the preferred stock, such dividend shall be payable from future profits, and no dividend shall at any time be paid upon general stock until the full amount of seven per centum per annum up to that time upon all the preferred stock shall have been paid or set apart. The holders of preferred stock shall be entitled to no dividends beyond the seven per centum aforesaid.

Form 113. Same — Another Form.[33]

The holders of the preferred stock shall be entitled to receive, when and as declared, on the surplus or net profits of the corporation, yearly dividends at the rate of seven per centum per annum and no more, payable quarterly on dates to be fixed by the by-laws. The dividends on the preferred stock shall be cumulative, and shall be payable before any dividend on the common stock shall be paid or set apart; so that if in any year dividends amounting to seven per centum shall not have been paid thereon, the deficiency shall be payable before any dividends shall be paid upon or set apart for the common stock. Whenever all cumulative dividends on the preferred stock for all previous years shall have been declared and shall become payable, and the accrued quarterly instalments shall have been

[33] U. S. Steel Corporation.

declared, and the Company shall have paid such cumulative dividends for the previous years and such accrued quarterly instalments, and shall have set aside from its surplus or net profits a sum sufficient for the payment thereon, the Board of Directors may declare dividends on the common stock, payable then or thereafter, out of any remaining surplus or net profits. In the event of any liquidation or dissolution or winding up (whether voluntary or involuntary) of the corporation, the holders of the preferred stock shall be entitled to be paid in full both the principal amount of their shares and the unpaid dividends accrued thereon; the remaining assets and funds shall be divided and paid to the stockholders of the common stock according to their respective shares.

Form 114. Classification of Directors.

The directors of said corporation shall be classified, in respect to the time for which they shall severally hold office, into five classes. The first class shall be elected for a term of five years; the second class shall be elected for a term of four years; the third class shall be elected for a term of three years; the fourth class shall be elected for a term of two years; the fifth class shall be elected for a term of one year, and at each annual election after the first, the successors to the class of directors whose terms expire in that year shall be elected to hold office for the term of five years, so that the term of office of at least one class shall expire in each year.

Form 115. Restrictions on Transfer of Stock.

No stockholder shall sell or transfer any stock in this corporation except upon the following conditions, which, however, may be waived by the board of directors in any particular instance: A stockholder wishing to sell or transfer any of his stock, shall first, in writing, offer to sell the same to the company, through the board of directors, disclosing the consideration for the proposed sale or transfer, and the name and address of the person to whom it is to be made. The board of directors shall have twenty days from the date of such offer to purchase the stock in behalf of the company, for a consideration to be

determined by three arbitrators, of which one shall be appointed by each party and the third by the two so appointed; or the board may, after such determination, elect to buy the said stock at the price of the proposed sale or transfer.

Form 116. Same.

No share of stock of the corporation shall be sold by the owner without first offering it to the stockholders through the treasurer, who shall notify the stockholders that said stock is for sale. Stockholders shall have thirty days from the date of mailing or delivery of such notice in which to apply for said stock. The stock shall be divided in accordance with the applications, except that, in cases where the applications exceed the number of shares offered, the apportionment shall be made *pro rata* to the applicant's holding of stock. Stock purchased hereunder by stockholders shall be purchased on the basis of the last inventory and may be paid for in the following manner: twenty-five per cent of the purchase price in cash within ten days from the date of mailing or delivery of the notification of the allotment of stock, and seventy-five per cent in three notes secured by pledge of the stock purchased each for twenty-five per cent of the purchase price, and payable two, four and six months respectively after the date of the cash payment. Stock not so purchased may be sold in open market or otherwise by the owner.

Form 117. Voting Rights of Common and Preferred Stock; Dividends.[34]

The holders of the common stock shall have or exercise the right to vote the same, or as owners of the same, at any meeting of the holders of the capital stock of the company the aforesaid holders shall be entitled to one vote for each share.

The holders of preferred stock shall not have or exercise the right to vote the same, or as owners of the same, at any meeting of the holders of the capital stock of the company. The holders of the preferred stock are entitled to receive a cumu-

[34] These provisions would usually appear in the Agreement of Association. See supra, Form 1.

lative dividend of seven per cent per annum, payable yearly, before any dividend shall be paid on the common stock.

C. CONCERNING MEETINGS.

Form 118. Minutes of Meeting for Incorporation.

The first meeting of the incorporators of..... .....Company was held at the office of ....., No. .....Street, in the City of....., Massachusetts, on the..... day of....., 19.., at.....o'clock in the..... noon (notice of said meeting having been waived by all of the incorporators in writing, endorsed upon the agreement of association, and the time and place of said meeting having been fixed as aforesaid in said waiver of notice).

There were present..... .... being.....of the said incorporators.

Upon motion duly made and seconded, Mr. ..... was elected chairman of the meeting.

Upon motion duly made and seconded, it was

Voted, to proceed by ballot to the election of a temporary clerk.

Thereupon all the incorporators proceeded to cast one ballot each for the choice of a temporary clerk, and Mr. ..... was declared duly elected, receiving all of the votes cast. He was thereupon duly sworn, as appears by the following certificate: —

COMMONWEALTH OF MASSACHUSETTS.

.....ss. .....19..

Then personally appeared..... and made oath that he would faithfully discharge the duties of temporary clerk at the meeting of the incorporators of .....Company.

Before me,

.....

Justice of the Peace.

Upon motion duly made and seconded, it was *Voted,* to adopt the following by-laws: —

[Insert copy of by-laws.]

Upon motion, duly made and seconded, it was

Voted, to proceed by ballot to the election of a board of directors. The whole number of ballots cast was.....
all of which were for.....
.....
.....
.....
who were declared elected, and thereupon severally accepted their election, and entered upon the discharge of the duties of their office.

Upon motion, duly made and seconded, it was

Voted, to proceed by ballot to the election of a treasurer. The whole number of ballots cast was.....all of which were for.....
who was declared elected, and thereupon accepted his election, and entered upon the discharge of the duties of his office.

Upon motion, duly made and seconded, it was

Voted, to proceed by ballot to the election of a clerk. The whole number of ballots cast was.....all of which were for .....who was declared elected, and thereupon accepted his election, and entered upon the discharge of the duties of his office, after being duly qualified, as appears by the following record: —

COMMONWEALTH OF MASSACHUSETTS.

.....ss. .....19..

Then personally appeared the above-named.....
.....and made oath that he would faithfully discharge the duties of the office of clerk of.....
.....Company.

Before me,

.....

Justice of the Peace.

I, ...temporary clerk of the first meeting of incorporators of..... .....Company, hereby certify and attest that the foregoing is a true and accurate record of the proceedings held at said first meeting to and including the qualification of the clerk of said corporation.

A true record.

Attest:

.....

Temporary Clerk.

Upon motion, duly made and seconded, it was

Voted, to adjourn.

A true record.

Attest:

.....

Clerk.

Form 119. Minutes of First Meeting of Directors.

The first meeting of the board of directors elected by the incorporators of..... Company, was held at the office of....., No. ..... Street, ..., Massachusetts, on ....., 19.., at.....o'clock in the.....noon.

Present:

....
....
....

being.....the directors of the corporation.

Upon motion, duly made and seconded, Mr. ..... was elected chairman of the meeting until the election of the president.

The clerk presented and read the following waiver of notice of the meeting, which was ordered to be filed with the records of the directors: —

WAIVER OF NOTICE OF FIRST MEETING OF DIRECTORS.

We, the undersigned, being all the members of the board of directors elected by the incorporators of..... .....Company, hereby waive notice of the time and place of the first meeting of the said board of directors, and of the business to be transacted at said meeting.

We designate the.....day of.....19.., at.....o'clock in the.....noon, as the time, and the office of....., No. ..... Street, ..., Massachusetts, as the place of said meeting, the purpose of said meeting being to elect officers; to authorize the issue of the stock of the corporation; to authorize the purchase of property necessary for the business of the corporation; and to transact such other business as may be necessary or advisable to complete its organization and to facilitate the carrying on of its contemplated business.

....
....
....

Dated....., 19..

Upon motion, duly made and seconded, it was

Voted, to proceed by ballot to the election of a president of the corporation. The whole number of ballots cast was..... of which.....were for.....who was declared elected, and thereupon accepted his election, and therafter presided at the meeting.

Upon motion, duly made and seconded, it was

Voted, to proceed by ballot to the election of a..... of the corporation. The whole number of ballots cast was .....of which.....were for..... who was declared elected, and thereupon accepted his election and entered upon the discharge of the duties of his office.

Upon motion, duly made and seconded, it was

Voted, to adopt the following as the form and style of the certificates to be issued for the stock of the corporation: —

[Insert proof.]

Upon motion, duly made and seconded, it was

Voted, to adopt as the seal of the corporation the seal presented at this meeting, an impression of which is hereby directed to be made in the margin of the records of this meeting.

Upon motion, duly made and seconded, it was

Voted, that the treasurer be and he is hereby directed to forthwith furnish and deliver to the clerk of the corporation a bond, in such form as may be approved by the president, in the penal sum of.....dollars, to be executed by..... as surety, to secure the full and faithful performance by the said treasurer of the duties of his office.

Upon motion, duly made and seconded, it was

Voted, that the treasurer be and he is hereby directed to open an account in the name and on behalf of the corporation with the.....Bank of.....which is hereby authorized to make payments from funds of the corporation on deposit with said bank upon presentation of checks signed by the.....of this corporation.[35]

Upon motion, duly made and seconded, it was

Voted, to accept the subscriptions of

..... , ...
....
....

[35] In regard to this and some of the subsequent votes, it may be noted that there is no corporation in existence until the certificate is issued, and therefore the directors have strictly no power to deal with third persons on behalf of the corporation. If it is desired to pass such votes at the first meeting of directors, it is desirable to pass a vote at the first meeting after the issuing of the certificate ratifying all votes passed at previous meetings.

the incorporators of this corporation for the amount of stock subscribed for by each of them, the said shares to be paid for in full in the manner following: —

Upon motion, duly seconded, it was

Voted, that the.....Trust Company of..... be and the same hereby is appointed the transfer agent and registrar of transfers of this corporation, and the clerk is hereby authorized to make the necessary arrangements with said Trust Company to carry this vote into effect.

The president then presented the following proposition: —

To the stockholders and directors of.....Company:
Gentlemen:

I hereby offer, in consideration of the issue, transfer and delivery to me of the entire common stock of the..... Company, to sell, assign and transfer to said Company my entire automobile and garage business now carried on at .....Street, ...Massachusetts, together with all machines and parts now on hand and supplies of all kinds, together with the lease of the building and garage, and all assets and goodwill, with the benefit of all outstanding contracts and bills and accounts receivable; the..... Company to assume all liabilities of said business at present outstanding.

Very truly yours,

.....

Upon a motion duly seconded it was

Voted, that whereas the proposition of.....to sell his automobile and garage business to this Company for its entire common stock, as contained in his letter dated....., appears to be reasonable and beneficial for this Company, and the property appears to be worth the par value of the entire common stock of this Company, said proposition is hereby accepted, and the president and treasurer are hereby authorized, upon receipt of duly executed assignments and bills of sale of said property, to issue to.....the entire common stock of this Company.

Upon motion, duly made and seconded, it was

Voted that ....., ..., ..., being a majority of the board of directors, shall forthwith make, sign, and make oath to articles of organization, in the form required by the laws of the Commonwealth, which shall be submitted to the commissioner of corporations for his examination and approval. Upon the indorsement of the approval of the commissioner upon said articles of organization, the said directors are hereby authorized and directed to pay the organization fee required by law, and to file the said articles in the office of the secretary of the commonwealth.

Upon motion, duly made and seconded, it was then voted to adjourn.

Attest:

.....,
Clerk.

Form 120. Waiver of Notice of First Meeting of Directors.

We, the undersigned, being all the members of the board of directors elected by the incorporators of..... Company, hereby waive notice of the time and place of the first meeting of the said board of directors, and of the business to be transacted at said meeting.

We designate the.....day of..... 19.., at.....o'clock in the.....noon as the time, and the office of....., No.....Street, in the City of....., Massachusetts, as the place of said meeting, the purpose of said meeting being to elect officers; to authorize the issue of the stock of the corporation; to authorize the purchase of property necessary for the business of the corporation; and to transact such other business as may be necessary or advisable to complete its organization and to facilitate the carrying on of its contemplated business.

Dated.....19...

Form 121. Form of Proxy — General Meeting.

KNOW ALL MEN BY THESE PRESENTS, That..... .....the undersigned Stockholder in the..... .....do hereby appoint.....true

and lawful Attorney, with power of substitution, for..... and in.....name, to vote at the meeting of the stockholders in said Company, to be held at..... or at any adjournment thereof, with all the powers..... should possess if personally present, hereby revoking all previous proxies.

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Witness, ...

Substitution on back of Proxy.

I, ..., hereby appoint ....., ... and ....., or any one of them, to be the true and lawful attorney or attorneys, in substitution for myself, of my principal executing the proxy on the face hereof, with all the powers given me therein.

Dated.....

Witness.....

Form 122. Same — Special meeting.

Know All Men by These Presents,

That I, M. V., the undersigned stockholder in the W. Copper Company, do hereby appoint H. S. my true and lawful attorney, with full power of substitution, for me and in my name to vote at a special meeting of the stockholders in said Company to be held at the office of S. and G. in Boston, Massachusetts, in March, 1899, or at any adjournment thereof, with all the powers I should possess if personally present, said special meeting to be held for the purpose of amending Articles 8 and 10 of the by-laws of the Company in the manner following, to wit:

Amend Article 8 of the by-laws by striking out in the third sentence thereof the word "countersigned" and the word "registered" and substituting the word "signed" for the word "countersigned;" and amending Article 10 by striking out in the third line thereof the word "countersigned" and likewise by striking out the words "and in the presence of the Secretary or other authorized officer or agent of the Company."

And I hereby authorize and direct my said attorney to execute the waiver in writing of any and all notice on my part of said meeting, and I do hereby authorize and direct him to vote in favor of the proposed changes in amendment of the by-laws.

Form 123. Notice of Annual Meeting.

[Name and address of stockholder.]

Dear Sir:

You are hereby notified that the annual meeting of the stockholders of the.....Company will be held in the Company's office, ...Street, in the City of ....., Massachusetts, on.....at..... o'clock in the.....noon, for the election of Directors, Treasurer and Clerk, and for the transaction of any other business that may properly come before the meeting.

The stock transfer books of the Company will be closed at .....o'clock on....., and be opened at..... o'clock on.....

If you do not expect to be present, please sign and return the enclosed blank form of proxy.

Respectfully yours,

.....

Clerk.

Form 124. Waiver of Notice of Stockholders' Meeting.

To the Clerk of the.....Company:

We, the undersigned, being all the stockholders of the .....Company, waive all requirements of the statutes of Massachusetts and the by-laws of this Company in relation to the calling of meetings of stockholders, and hereby accept notice of (the annual or a special) meeting of said.....Company to be held in..... Building, ...Street, ..., Massachusetts, on....., at.....o'clock, in the..... noon.

Form 125. Minutes of Annual Meeting.

The.....annual meeting of the stockholders of the .....Company was held at the office of the Company, ...Street, in the City of....., on the .....day of.....at.....o'clock in the .....noon.

The President, ..., was in the chair, and the clerk, ..., was present and acted as clerk of the meeting.

The President announced the calling of the roll and the determination of a quorum as the first business in order. The roll was then called by the Clerk, who stated that the number of stockholders personally present was....., the number of those represented by proxy was....., total....., the total number of outstanding shares was....., necessary to a quorum..... The President declared a quorum to be present.

The clerk presented and read a copy of the notice of the meeting together with proof of the due mailing thereof to each stockholder as required by the by-laws.

The President then stated that the next business in order would be the reading of minutes of the preceding meetings. The Clerk then read the minutes of the preceding annual meeting of the stockholders, and of the special meetings held ....., and the minutes of all said meetings were duly approved.

The President then announced that the reports of officers and committees would be the next business. The President presented and read his own annual report, which upon motion duly seconded, was ordered to be received and placed on file. The Treasurer presented and read his annual report, which on motion duly seconded was likewise ordered to be received and placed on file.

The President then announced that the election of officers was the next business and appointed.....

.....

.....
.....
as tellers to collect and count ballots.

On a motion duly seconded it was

Voted, that the meeting elect a Board of..... Directors by ballot. A ballot having been had, the tellers reported that.....votes were cast for....., and they were declared duly elected as Directors of the Company. They thereupon accepted their election.

Upon motion duly seconded, it was then

Voted, that the meeting proceed to elect a Treasurer by ballot, and a ballot having been had, the tellers announced that .....votes were cast, all for....., and he was declared duly elected Treasurer of the Company. He thereupon accepted his election.

Upon motion, duly seconded, it was then

Voted, that the meeting proceed to elect a Clerk by ballot, and ballot having been had, the tellers announced that..... votes were cast, all for....., and he was thereupon declared duly elected Clerk of the meeting. He was thereupon duly sworn as follows:

COMMONWEALTH OF MASSACHUSETTS.

.....ss. .....

Then personally appeared the above named..... and made oath that he would faithfully discharge the duties of his office as Clerk of the.....Company.

Before me,

.....

Justice of the Peace.

The President then announced that the next business in order was the election of a committee of three to appoint an Auditor.[36]

[36] This applies only to corporations having a capital stock of $100,000 or more. St. 1903, c. 437, § 47.

Upon motion, duly seconded, it was

Voted, that the President appoint a committee of three stockholders who are not directors to employ an Auditor as provided by St. 1903, c. 437, § 47. The President appointed as such committee.....

Upon motion, duly seconded, it was then

Voted, that all acts and doings of the Board of Directors on behalf of the Company for the preceding year are hereby ratified and approved.

Upon motion, duly seconded, it was

Voted, to adjourn.

A true record. Attest:

.....

Clerk.

D. CONDUCT OF BUSINESS.

Form 126. Miscellaneous Directors' Votes -- Appointment of Transfer Agent and Register of Transfers.

Voted, that the.....Trust Company of .....be and the same is hereby appointed to act as transfer agent and registrar of transfers with respect to the shares of the capital stock of this Company, with the duties usually appertaining to such offices, and the treasurer and clerk are hereby directed to arrange with said Trust Company the details necessary to carry out this vote.

Form 127. Same — Borrowing Money and Issuing Bonds.

Voted, that it is expedient that this Corporation raise the sum of.....dollars for the purpose of ....., by an issue of mortgage bonds secured by a trust mortgage upon its real estate and plant, and the president is hereby directed to call, in accordance with the by-laws of the Company, a special meeting of the stockholders to consider the matter.

Form 128. Same — Borrowing Money on a Note.

Voted, that the treasurer be and he is hereby authorized to make and sign on behalf of the Corporation, its note for .....dollars, payable in.....months from date, and to have the same discounted at such bank as he may deem advisable, and that the proceeds be placed in the treasury of the Company.

Form 129. Same — Call for Subscription under § 15.

Voted, that an assessment of twenty-five per cent. of the par value of the capital stock be and the same is hereby called for, and that payment thereof shall be made to the treasurer at his office on or before July 1, 1908; and that the treasurer mail to each subscriber a notice containing a copy of this vote on or before June 23, 1908.

Form 130. Same — Call for Subscription under § 16.

Voted, that an instalment of the subscription to the capital stock of the Company to the amount of twenty-five dollars per share is hereby called for, and that payment thereof shall be made to the treasurer at his office on or before July 1, 1908; and that the treasurer mail a notice containing a copy of this vote to each stockholder on or before June 16, 1908.

Form 131. Same — Dividend.

Voted, that the sum of fifty thousand dollars be and the same is hereby appropriated from the net earnings of the Corporation for the payment on July 1, 1908, of a quarterly dividend of .....dollars per share on the capital stock, the same to be payable to stockholders of record at the close of business June 20, 1908; and that the transfer books be closed at the close of business June 20, 1908, and reopened July 2, 1908.

Form 132. Same — Execution of Lease.

The president then presented a form of lease from..... to the.....Company, of the premises numbered .....on.....street in the city of.....,

for the term of.....years from.....; and the same having been read, it was

Voted, that the president be and he is hereby authorized to execute and deliver in the name and on behalf of this Corporation under the corporate seal, the lease from..... of the premises.....which has just been read.[87]

Form 133. Same — Increase of Capital Stock.

Voted, that in the opinion of this board it is desirable that the capital stock of the Company shall be increased by the issue of one thousand new shares of the par value of one hundred dollars each, and that the matter be brought at once before a special meeting of the stockholders for their action.

Form 134. Same — Salary.

Voted, that the salary of the treasurer for the year beginning .....and ending.....be $..... payable in monthly instalments.

Form 135. Certified Copy of Vote.

I, ..., clerk of the.....Company, hereby certify that at a meeting of the directors of said Company held on the.....day of....., the following vote was passed:

[Copy of vote.]

Attest:

.....

Clerk of.....Company.

Dated.....

Form 136. Testimonium Clause for Written Instruments.

In witness whereof, the.....Company has caused these presents to be signed in its name and on its

[87] It usually is desirable to have the instrument, if important, copied into the corporate records. In this case the words, "and a true copy of which follows," can be added to the above vote.

behalf by.....its president, and.....its treasurer, and its corporate seal to be hereto affixed, this .....day of.....

.....*Company.*
by.....*President.*
.....*Treasurer.*

[Corporate seal.]

Form 137. Treasurer's Bond.

KNOW ALL MEN BY THESE PRESENTS, That we.....of.....as principal, and .....of....., and.....of....., as sureties are held and firmly bound unto the..... Company, its successors and assigns in the sum of..... dollars, to the payment of which we bind ourselves, our heirs, our executors and administrators jointly and severally by these presents.

IN WITNESS WHEREOF we have hereunto set our hands and seals this.....day of.....19..

The condition of this obligation is such that, whereas the said .....has been duly elected and is about to enter upon the duties of Treasurer of said.....Company,

NOW, THEREFORE, if he shall in all respects faithfully discharge his duties as Treasurer so long as he shall hold the said office, or during the term for which he is now or may hereafter be elected, appointed or hold over, and also if in case of his death, resignation or removal from office, all books, documents, papers, vouchers, accounts, money and other property of whatever nature in his possession belonging to said Company shall be forthwith restored to the Company, then this obligation is to be void; otherwise to be in full force and virtue.

Signed, sealed and delivered in presence of

E. MISCELLANEOUS FORMS.

Form 138. Certificate of Preferred Stock.

.....Company.

Incorporated under the laws of the Commonwealth of Massachusetts.

Capital Stock	$.....
Preferred Stock	.....
Common Stock	.....

This is to certify that.....is the holder of.....shares of the preferred capital stock of the.....Company, full paid and non-assessable, transferable only on the books of the corporation by the holder hereof in person or by duly authorized attorney, upon the surrender of this certificate properly endorsed.

In accordance with the agreement of association of said Company, the holder of this certificate is entitled to receive a semi-annual cumulative dividend at the rate of.....per centum per annum, before any dividend is paid upon the common stock. This preferred stock is subject to redemption at its par value and all accumulated dividends, upon such notice to the holder hereof as the Directors may determine on any interest day after the first day of....., 19.., and upon surrender of this certificate to the Treasurer. After this stock has been called for redemption, there shall be no further obligation on the part of said Company to pay any further dividend to the holder hereof. In the event of liquidation, the net proceeds of the assets of the Company shall be first applied to the payment to the holders of the preferred stock of the sum of one hundred dollars per share and accrued and unpaid dividends thereof. The balance remaining thereafter shall be divided among the holders of the common shares in proportion to their holdings. The holders of preferred and common shares shall have equal voting rights in the corporation. This certificate is not valid unless signed by the transfer agent of the Company and countersigned and registered by the registrar of transfers.

IN WITNESS WHEREOF the said.....

Company has caused its seal to be hereto affixed and this certificate to be executed by its president and treasurer this .....day of....., 19..

[Seal.] .....*President.*

.....*Treasurer.*

Shares one hundred dollars each.

Form 139. Certificate of Common Stock.

.....Company.

Incorporated under the laws of the Commonwealth of Massachusetts.

Capital Stock $.....

Preferred Stock .....

Common Stock .....

This certifies that.....is the holder of .....shares of the capital stock of..... Company, full paid and non-assessable, transferable only on the books of the corporation by the holder hereof in person, or by duly authorized attorney upon surrender of this certificate properly endorsed.

This certificate is not valid unless countersigned by the transfer agent of the Company, and countersigned and registered by the registrar of transfers.

IN WITNESS WHEREOF the said..... Company has caused its seal to be hereto affixed and this certificate to be executed by its president and treasurer this .....day of....., 19..

[Seal.] .....*President.*

.....*Treasurer.*

Shares one hundred dollars each.

Form 140. Agreement to Hold Stock in Trust for the Corporation.

KNOW ALL MEN BY THESE PRESENTS, that I, of....., Treasurer of the.....Company, a corporation existing under the laws of the Commonwealth of Massachusetts, do acknowledge that I hold.....

shares of the capital stock of the.....Company, a corporation existing under the laws of the State of..... for the benefit of and in trust for the said..... Company, and for this purpose I do hereby make the following declaration of trust in relation thereto, to wit: —

(1) So long as I continue to hold the same, the said shares or any part thereof are to be treated and disposed of in accordance with the vote of the Directors of the said..... Company.

(2) In case I shall from any reason cease to be Treasurer of the said.....Company, the said shares shall pass without any transfer to the new Treasurer of said..... Company appointed in my place, but I agree to execute such transfer of the same as may be necessary and proper.

(3) In case I shall die while Treasurer of the said..... .....Company the said shares shall pass without further transfer to the newly appointed Treasurer of the..... Company, but I direct my executor or administrator to execute such a transfer of the same as may be necessary and proper.

(4) All dividends or rights accruing on said shares shall become the property of the said.....Company, and votes upon the same shall be cast as its executive officers may direct.

IN WITNESS WHEREOF I have hereunto set my hand and seal on this.....day of....., ...

Form 141. Voting Trust.

THIS AGREEMENT made this first day of September, nineteen hundred and...., between.....and all other stockholders of the.....Company, a corporation, who shall become parties to this agreement by signing the same or any counterpart thereof (hereinafter called the "Subscribers"), parties of the first part, and..... and.....(hereinafter called "Trustees"), parties of the second part.

WITNESSETH:

That *WHEREAS* the parties of the first part deem it to their interest to act together concerning the management of the .....Company, of which they are respectively stockholders, and to that end to unite the voting power held by them as such stockholders and place the same in the hands of the Trustees as hereinafter provided:

NOW, by this agreement, made in consideration of the premises, of the mutual covenants herein contained, and of one dollar by each of the parties to the others in hand paid or before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, the parties hereto hereby agree as follows:

FIRST: The parties of the first part hereby severally agree forthwith to deliver and deposit the number of preferred and common shares of the capital stock of the..... Company set opposite their respective names, and the certificates therefor to and with the said Trustees with sufficient transfers thereof in favor of such Trustees, and to receive in exchange therefor the certificates hereinafter referred to, which deposit shall continue for the period of one year and six months from the date of this agreement, that is to say, until the .....day of....., unless sooner terminated as herein provided, and upon the making of such delivery and deposit, all shares represented by the stock certificates so delivered shall be transferred upon the books of the said .....Company to the names of said voting trustees, who are hereby fully authorized and empowered to cause such transfers to be made and also to cause any other transfers of said shares to be made which may become necessary through the occurrence of any change of the persons holding the office of trustees or a sale of such shares as hereinafter provided. And during the said period of one year and six months or earlier termination of the trust, the voting trustees shall possess and be entitled to exercise all the rights of every name and nature, including the right to vote in respect of any and all such shares deposited, and to consent or assent therefor to any lawful action of the said corporation; it being understood, however, that the holders of the trust certificates

to be issued by the Trustees shall be entitled to receive payments equal to the dividends, if any, collected by said Trustees upon the shares of such stock standing in their names after deducting the *pro rata* amount of expenses incurred in the management of the trust as hereinafter set forth.

SECOND: The Trustees do hereby promise and agree with the said stockholders and with every holder of certificates issued as hereinafter provided, that from time to time, upon request, they will cause to be issued to the several stockholders in respect of all preferred or common stock deposited by them, and to an aggregate amount equal to the amount of all stock so deposited, certificates which, as regards the preferred stock, shall be in substantially the following form, to wit:

No. .... Shares.

.....COMPANY.

(Organized under the Laws of the State of.....)

PREFERRED STOCK TRUST CERTIFICATE.

THIS IS TO CERTIFY That on the.....day of ....., or upon the earlier termination of the voting trust then immediately upon such termination, ... will be entitled, on the surrender of this certificate duly endorsed, to receive a certificate or certificates for..... full-paid and non-assessable preferred shares of stock of the .....Company, and in the meantime, to receive payments equal to the dividends, if any, collected by the undersigned Trustees upon a like number of such shares of preferred stock standing in their names after deducting expenses as set forth in said agreement; and, until the said.....day of ....., unless such stock shall be sooner surrendered, the said Trustees shall possess and be entitled to exercise all rights of every name and nature, including the right to vote, consent and assent to any action by the said corporation in respect of any and all such stock; it being expressly stipulated that no voting, consenting or assenting right passes to the holder hereof by or under this certificate or under any agreement express or implied.

This certificate is issued pursuant to the terms of an agree-

ment in writing dated the.....day of....., made and entered into between stockholders of said Company and said Trustees, which agreement is on file in the office of the said Company where its principal business is transacted, and in that of the.....Trust Company of....., to which agreement the holder hereof assents by receiving this certificate.

This certificate is transferable only on books, which shall be kept for that purpose by said Voting Trustees, by the registered holder either in person or by attorney duly authorized, according to rules which shall be established for that purpose by said Trustees, and on surrender hereof; and, until so transferred, said Trustees may treat the registered holder as owner hereof for all purposes whatsoever, except that delivery of said certificates of stock hereunder shall not be made without the surrender hereof.

This certificate is not valid unless signed by the said Trustees or by their duly authorized agent, the.....Trust Company.

IN WITNESS WHEREOF, said Trustees have caused this certificate to be signed by the.....Trust Company as their duly authorized agent, this.....day of ....., 190..

....., ...,

Voting Trustees.

By their Agent hereunder:

.....TRUST COMPANY,

Secretary.

FORM OF ENDORSEMENT FOR TRANSFER.

FOR VALUE RECEIVED.....do hereby sell, assign and transfer the within stock trust certificate calling for .....shares of the preferred capital stock of the .....Company, and all interest therein, subject, however, to all the terms and conditions of the agreement referred to in this certificate, which are adopted and assented to by accepting this certificate and transfer, and.....do

irrevocably constitute and appoint.....attorney to transfer such interest on the books of the Trustees within mentioned, with full power of substitution in the premises.

Dated....., 190..

In the presence of:

..... [L. S.]

.....

THIRD: The Stock Trust Certificates for common stock of the.....Company shall be in substantially the same form, *mutatis mutandis.*

FOURTH: That the said stock so held in trust hereunder shall immediately, upon the transfer thereof to the names of said Trustees, be deposited by them, together with transfers thereof duly executed in blank, with the.....Trust Company of.....(hereinafter called the "Trust Company"), and the Trustees may appoint the..... Trust Company transfer agent for the trust certificates hereinbefore referred to, and fix proper compensation for their services in registering and transferring the same.

The Trustees may at all times treat as the owners of the stock deposited hereunder those whose names appear upon the books of the Trustees as the record owners of the said trust certificates representing such stock, except that the delivery of said stock hereunder shall not be made without the surrender duly endorsed of the trust certificates therefor. And

FIFTH: That the said trust certificates so issued by the Trustees may be transferred only on the books which shall be kept for that purpose by the said Trustees by the registered holder either in person or by attorney duly authorized according to the rules which shall be established for that purpose by said Trustees and on the surrender of said trust certificates and the acceptance of said trust certificates in lieu of those surrendered shall constitute those who receive them parties hereto with the same effect as if they had signed this agreement. And

SIXTH: That on the.....day of....., or upon the earlier termination of the voting trust, the Trustees,

in exchange for and upon surrender duly endorsed of any of their trust certificates then outstanding, will in accordance with the terms hereof, deliver proper certificates for equivalent amounts of preferred or common stock of the..... Company, according as the certificates so surrendered were issued for preferred or common stock. And

SEVENTH: That this agreement may be terminated at any earlier date at the option of the Trustees or of seventy-five per cent. in interest of the registered holders for the time being of Stock Trust Certificates issued hereunder, and the Trustees agree that in such event, upon receiving satisfactory evidence in writing of the due exercise of such option, they will unite in causing the stock deposited under this agreement to be transferred and certificates of stock to be issued to the holders of Stock Trust Certificates as herein provided to be done at the expiration of the period of one year and six months hereinbefore mentioned. And

EIGHTH: That the Trustees shall receive the dividends that may be declared from time to time during the existence of this agreement upon the stock transferred to them by the subscribers hereto, and after paying the charges and expenses of the Trust Company and the costs and expenses of executing this trust, shall forthwith pay the balance of the same to the holders of the trust certificates as their interest shall appear on the books of the Trustees. And

NINTH: That the Trustees shall receive no compensation for their services, but are hereby authorized to pay all expenses, including counsel fees for the execution of said trust and expenses for registering and transferring said Trust Certificates as aforesaid. The Trustees shall have full power and authority to change the depositary, or transfer agent, of said Trust Certificates to any other responsible trust company in the City of New York upon the same terms and conditions as those hereinabove set forth. And

TENTH: That in case of a vacancy in a trusteeship by reason of death, incapacity, resignation or otherwise, the said trusteeship filled or to be filled by.....shall, in case of such vacancy therein, be assumed and undertaken by

.....of....., in the County of..... and Commonwealth of Massachusetts, or in the event of his death, incapacity, resignation or otherwise, by some person designated by said....., or, in default thereof, by said ....., and the said trusteeship filled or to be filled by said.....shall, in case of such vacancy therein, be assumed and undertaken by....., of....., or in the event of his death, incapacity, resignation or otherwise, by such person designated by said....., or, in default thereof, by said..... Such designation shall be effected by depositing with the Trust Company for the time being acting as depositary of the certificates of stock, an instrument signed by the proper parties as herein provided, setting forth such designation, but before action thereon may be withdrawn by the person making the same and another designation or other designations substituted therefor. And

ELEVENTH: That in voting the stock held by them, the Trustees will exercise their best judgment from time to time to select suitable directors to the end that the affairs of the Company shall be properly managed, and in voting on other matters which may come before them at any stockholders' meeting, or in consenting or assenting to any lawful action by the corporation, will exercise like judgment; but it is understood that no trustee shall incur any personal liability or responsibility by reason of any errors of law or of any matter or thing done or omitted by him or his agents or attorneys under this agreement, except for his own gross negligence or bad faith. Should the said trustees fail to agree as to how the said trust stock shall be voted on any resolution, question or election, or on any consent or assent to an act of the corporation, in that event the said Trustees shall not vote, consent or assent on such particular resolution, question or election, but this agreement shall not be terminated thereby. And

TWELFTH: The word "Subscriber" when used in this instrument, shall refer to the persons depositing at any time stock of the.....Company with the Trustees hereunder, or who may at any time be the record holders of trust certificates hereinbefore mentioned.

The word "Trustees" shall be construed to mean the Trustees for the time being under this agreement.

The words "Trust Company" herein, unless the context clearly shows a different meaning, shall be construed to mean the Trust Company who shall, at the time being, act as the depositary of the stock held in trust hereunder or who shall act as the transfer agent of the Trust Certificates hereunder. And

THIRTEENTH: That in case at any time it shall be necessary or proper for the Trust Company to make any investigation respecting any facts preparatory to taking or not taking any action or doing or not doing anything hereunder, the certificate of the Trustees for the time being shall be conclusive evidence of such facts to protect the Trust Company in any action it may take by reason of the supposed existence of such facts. And

FOURTEENTH: That from time to time after this agreement shall have taken effect the Trustees shall receive any additional full-paid and non-assessable shares of stock of the .....Company that shall be offered for deposit hereunder, upon the terms and conditions of this agreement, and in respect of all such shares so received, will issue and deliver certificates similar to those above mentioned entitling the holders thereof to all the rights above specified. And

FIFTEENTH: That this agreement may be executed in several counterparts, each of which so executed shall be deemed to be an original, and such counterparts shall together constitute one and the same instrument.

IN WITNESS WHEREOF the subscribers hereto have hereunto set their hands and seals and have set opposite their names the number of shares of common stock which they transfer to the Trustees, and the Trustees have hereunto set their hands and seals in token of the acceptance of the Trust hereby created, the day and year first above written.

In presence of:

.....

Trustee.

.....

Trustee.

NAME.	NO. OF SHARES.

Form 142. Bond of Indemnity for Lost Certificate.

KNOW ALL MEN BY THESE PRESENTS that we, ... of ..... as principal, and.....of....., as surety, are held and firmly bound unto..... .....Company, a corporation duly organized and existing under the laws of the State of..... ....., in the sum of.....dollars to be paid to said.....Company or its attorneys, successors or assigns, for which payment we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Witness our hands and seals this.....day of .....A. D. .....

The condition of this obligation is such that

WHEREAS a certain certificate of said..... .....Company numbered....., dated....., representing.....shares of its capital stock and issued in the name of said..... .....is alleged to have been lost or destroyed, and

WHEREAS ..... Company stands ready to issue a new certificate for a like amount of its capital stock to said.....as a sub-

stitute for said original certificate alleged to have been lost or destroyed,

NOW, THEREFORE, if the said..... and.....shall indemnify and save harmless said.....Company from and against any and all claims and demands by any person on account of said original certificate alleged to have been lost or destroyed and against all costs and expenses by reason of such claim, including costs of court, counsel fees or other expenses to which said.....Company may be put in any action or suit regarding said shares of stock, and shall in all other respects fully indemnify and hold harmless the.....Company in the premises, then this obligation shall be void, otherwise it shall stand in full force and effect.

Signed and sealed in the presence of .....
.....

Form 143. Same — Where Certificate Assigned in Blank before loss.

KNOW ALL MEN BY THESE PRESENTS, that we, A. B., of .....in the County of.....and Commonwealth of Massachusetts, as principal, and E. F., of.....in the County of..... and.....of.....in the County of .....both in said Commonwealth, as sureties, are firmly bound unto the X. Company, a corporation duly established under the laws of said Commonwealth in the sum of $10,000 [twice par value of shares] to be paid to said X. Company, or its successors or assigns, for which payment we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. The condition of this obligation is such that whereas 50 shares of the capital stock of said X. Company now stands on said company's books in the name of C. D., being certificate numbered..... and the said A. B. claims to be the owner by assignment of said certificate and shares, and whereas said A. B. claims that said certificate

has been lost, and whereas said X. Company, at the request of A. B., and by vote of its Board of Directors is about to issue a new certificate to said A. B. for said 50 shares of capital stock:

NOW, THEREFORE, in case the said certificate shall hereafter be found, if the said A. B. and E. F. shall upon demand fully indemnify and hold harmless the said X. Company by reason of any claims and demands upon it for registration of said lost certificate, dividends or otherwise, and against all costs, and expenses by reason of such claims, including costs of court, counsel fees, or other expenses, to which said X. Company may be put in any action or suit regarding said shares of stock, and shall in all other respects fully indemnify and hold harmless the X. Company in the premises, then this obligation shall be void, otherwise, it shall stand in full force and effect.

IN WITNESS WHEREOF we, the said.....
.....
have hereunto set our hands and seals this.....day of.....19..

Form 144. Same — Form of vote Authorizing Issue of New Certificate.

WHEREAS A. B. claims to be the owner of certificate No. 29823 for 50 shares of the capital stock of the X. Company, and claims that said certificate has been lost; and whereas the said A. B. is prepared to give a bond with sufficient sureties to indemnify the said X. Company from all claims, damages, costs and expenses which may arise to or against said company by reason of the finding hereafter of said certificate, it is hereby

VOTED

that the Treasurer be and he hereby is authorized to issue a new certificate for 50 shares of the capital stock of the company to A. B., upon the filing by said A. B. of a bond of indemnity in the sum of $10,000, with sufficient sureties conditioned upon his indemnifying the company against all claims, damages, costs and expenses to which the company may be or

become liable, by reason of the finding hereafter of the said certificate now claimed to be lost.

Form 145. Option on Business of Individual.

The undersigned hereby agree , in consideration of..... dollars and other good and valuable considerations, paid by .....of....., the receipt whereof is hereby acknowledged, to sell, convey, assign, transfer and deliver to A. B., or his assigns, on or before the..... day of....., 19.., all of the right, title and interest of the undersigned to manufacture, produce and sell machinery of every kind and description whatsoever, together with each and every part thereof, employed in the tanning or leather-making machinery business, and any part or branch thereof, including the good will, processes, trade rights, trade-marks, brands, patents, applications for patents, inventions, formulas, recipes, trade names and patterns owned or controlled or at any time hereafter acquired, owned or controlled by the undersigned, used in or appertaining to or in any way connected with the said tanning or leather-making machinery business or any part or branch thereof, and appertaining to or in any way connected with the machinery and each and every part thereof, employed in such business; together with all of the machinery, tools, appliances, and supplies now used by the undersigned in connection with the tanning or leather-making machinery business, and any part or branch thereof, and any and all tanning or leather-making machinery, tools, appliances, and supplies which the undersigned may now have on hand for sale or otherwise.

The consideration for the said sale to be..... dollars, to be paid by the said A. B. or his assigns, to the undersigned at the time of the consummation of such purchase.

This option shall expire on the.....day of..... 19.., unless the said A. B. or his assigns shall, before that time, give notice in writing to the undersigned of his acceptance thereof, in which case the transaction is to be completed and the property delivered on the said.....day of..... 19.., or at any time prior thereto mentioned in said notice in writing.

It is understood and agreed that, in accepting this option, A. B. assumes no responsibility or liability to purchase the said property unless he or his assigns shall elect so to do by written notice as hereinbefore provided.

In the case of the purchase of the property covered by this contract, then contemporaneously therewith the undersigned shall execute a contract or contracts with A. B. or his assigns, by which the undersigned shall obligate.....for a period of.....years after the consummation of such purchase, not to engage or be or become interested directly or indirectly, as individual , partner , stockholder , director , officer , clerk , agent , or employee in the business of buying, manufacturing or selling new or second-hand tanning or leather-making machinery or any kindred products, anywhere except in Utah, Nevada, Arizona or Indian Territory.

WITNESS.....hand and seal this.....day of ....., 19..

Form 146. Option on Future Inventions.

KNOW ALL MEN BY THESE PRESENTS, that A. B. of .....in consideration of one dollar and other valuable considerations paid by C. D., the receipt whereof is hereby acknowledged, hereby agrees with said C. D. that in case said C. D. or his representatives or assigns shall take advantage of a certain option granted to him by the X. Company by a writing of even date herewith, and shall purchase from said company the property mentioned in said agreement at the time or within the time and upon the terms set forth, the said A. B. will upon the request of said C. D., his representatives or assigns, make, execute and deliver to said C. D. or his assigns, proper instruments in writing, whereby the said A. B. shall bind himself, if in future he shall invent, make or produce any machines, or any device, invention or improvement in machines, for use in the business of tanning or making leather, to forthwith communicate the same to said C. D. or his assigns, and to sell the same together with any and all patents thereon, to the said C. D. or his assigns, provided said C. D. or his assigns may desire to purchase the same, within

a reasonable time after the said A. B. shall have communicated the same to said C. D. or his representatives or assigns, at a price to be fixed by three appraisers, or any two of them, one of said appraisers to be named by said A. B. or his representatives, one by said C. D. or his representatives or assigns, and the third by the two so named, which price is to be paid by the said C. D. or his representatives or assigns to the said A. B. upon the said A. B. or his representatives assigning such machine, or any device, invention or improvement in machines, for use in the business of tanning or making leather, and any and all patents thereon, to said C. D. or his representatives or assigns.

And for the consideration aforesaid said A. B. further agrees that in case of the purchase by the said C. D. of the said property of the X. Company in accordance with the terms of said option then contemporaneously therewith said A. B. shall execute a contract or contracts with said C. D. or his assigns by which he shall obligate himself for a period of.....years after the consummation of such purchase, not to be or become interested directly or indirectly, as individual, partner, stockholder, director, officer, clerk, agent, or employee, in the business of buying, manufacturing, selling or repairing, new or second-hand tanning or leather-making machinery anywhere except in Utah, Nevada, Arizona or Indian Territory.

IN WITNESS WHEREOF the said A. B. has hereunto set his hand and seal this.....day of.....19..

Form 147. Assignment of Interest in an Invention.

WHEREAS I, ..., of ....., county of....., and state of....., have invented a certain new and useful improvement in .....for which I am about to make application for letters patent of the United States; and whereas the..... .....Company, a corporation of the Commonwealth or Massachusetts, is desirous of acquiring an interest in said invention and in the letters patent to be obtained therefor;

NOW, THEREFORE, TO ALL WHOM IT MAY CONCERN, be it known that, for and in consideration of the sum of.....

dollars to me in hand paid, the recipt of which is hereby acknowledged, I, the said....., have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto the said company, the full and exclusive right to the said invention, as fully set forth and described in the specifications prepared and executed by me on the....., day of....., 190.., preparatory to obtaining letters patent of the United States therefor; and I do hereby authorize and request the Commissioner of Patents to issue the said letters patent to the said.....Company, as the assignee of my entire right, title, and interest in and to the same, for the sole use and behoof of the said company, its successors and assigns.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed my seal this.....day of....., 190..

[Add Acknowledgment.]

Form 148. Assignment of Patent.

WHEREAS I,....., of....., county of....., state of ....., did obtain letters patent of the United States for an improvement in ....., which letters patent are numbered..... and bear date the.....day of....., in the year 190..; and whereas I am now the sole owner of said patent and of all rights under the same; and whereas the..... .....Company, a corporation of the Commonwealth of Massachusetts, is desirous of acquiring the entire interest in the same;

NOW THEREFORE, TO ALL WHOM IT MAY CONCERN, be it known that for and in consideration of the sum of..... dollars to me in hand paid, the receipt of which is hereby acknowledged, I, the said....., have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto the said.....company the whole right, title and interest in and to the said improvement in....., and in and to the letters patent therefor aforesaid; the same to be held and enjoyed by the said

company for its own use and behoof, and for the use and behoof of its successors and assigns, to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed my seal at....., in the county of..... and state of....., this.....day of.....190..

In presence of.....

[Add Acknowledgment.]

Form 149. Trust Mortgage.

THIS INDENTURE made the.....day of....., ..., by and between the.....Company, a corporation duly organized and existing under the laws of the State of....., hereinafter called the Company, which word shall include its successors and assigns, party of the first part, and the.....Trust Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, hereinafter called the Trustee, which word shall include any successors in the office of trustee hereby created, party of the second part, witnesseth that: —

WHEREAS, at a meeting of the directors of the Company, duly called and held on the.....day of....., ..., a quorum being present and acting, the following preambles and resolves were unanimously adopted, viz:

" WHEREAS, the Company is authorized by its charter to issue any and all bonds convenient for its business and to secure the same by mortgage, deed of trust, or any other form of conveyance, and

" WHEREAS, the by-laws of the Company empower the Board of Directors to incur such indebtedness as they shall deem necessary in behalf of the Company and to mortgage any or all of the property of the corporation, real, personal, or mixed, when in their judgment the interests of the corporation will be best promoted thereby, and

" WHEREAS, it is necessary for the attainment of the objects

of the Company to borrow the sum of.....dollars for the purpose of funding and retiring the floating debt of the Company and for other corporate purposes, and to issue coupon bonds of the Company for the amount so borrowed;

"NOW THEREFORE RESOLVED that this Company borrow the sum of.....dollars and issue therefor its first mortgage.....per cent. sinking fund gold bonds, bearing date ....., ..., due....., ..., substantially in the form following, to wit:

UNITED STATES OF AMERICA

No. $1,000

.....

COMPANY

First Mortgage ..... % Sinking Fund
Convertible Gold Bond,
due ....., ...

For value received the.....Company, a corporation organized and existing under the laws of the State of....., promises to pay to the..... Trust Company, Trustee, or to the bearer, or in case of registration to the registered holder hereof, the sum of one thousand dollars ($1,000) at the office of said Trust Company in the City of....., Commonwealth of Massachusetts, in gold coin of the United States of America, of the present standard of weight and fineness, on the first day of....., A. D. ....., with interest thereon in the meantime at the rate of ..... per cent. per annum, payable on the first days of April and October in each year, in like gold coin, upon presentation and surrender of the coupons attached hereto, as they severally become payable.

This is one of a series of one thousand (1,000) bonds of the same tenor and effect, numbered consecutively from one to one thousand, both inclusive, each for one thousand dollars ($1,000), amounting in the aggregate to.....dollars,

equally secured by a mortgage deed of trust of even date herewith, executed by said.....Company to the.....Trust Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, as Trustee, upon all its patented mining claims with their equipment owned at the date of said mortgage, and upon other property therein described.

Said deed of trust provides for the creation of a sinking fund in the hands of the Trustee.

This bond is subject to call on thirty (30) days' notice, at par and a premium of five per cent., with accrued interest, on any interest day and to redemption from funds paid by said .....Company to the Trustee for that purpose. Interest will cease on any bond called after the date fixed in said call as provided in said indenture.

This bond may be exchanged at the option of the holder for the fully paid stock of the said.....Company at the rate of twenty (20) shares of stock for each bond, with a cash adjustment of accrued interest and declared dividends, said exchange to be made on any interest day up to and including....., ..., but not afterwards.

This bond shall pass by delivery unless registered in the name of the owner on the books of the Trustee, such registration to be noted on the bond, and after such registration no transfer shall be valid unless made on said books by the registered holder in person or by attorney duly authorized, and noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which it shall be transferable by delivery, and shall continue subject to successive registrations and transfers to bearer as aforesaid at the option of the holder. In case of registration, the coupons annexed hereto shall remain transferable by delivery.

This bond is not valid unless the certificate endorsed hereon is signed by said Trustee.

IN WITNESS WHEREOF, the said.....
.....Company has caused these presents to be signed in its name and behalf by its president and its corporate seal to be hereunto affixed, and the execution hereof

to be attested by its secretary, and coupons for said interest with the engraved signature of its treasurer to be hereunto attached this.....day of....., A. D.....

.....

By

.....

Attest: PRESIDENT.

.....

SECRETARY.

No. COUPON. .....

On the first day of....., A. D. ....., the..... ....Company will pay to the bearer at the office of the.....Trust Company in the City of....., Massachusetts, ... dollars in gold coin of the United States of America of the present standard of weight and fineness, being six months, interest then due on its first mortgage .... % gold bond No. .... unless said bond shall have been previously called or converted into stock as provided in said mortgage.

TREASURER.

TRUSTEE'S CERTIFICATE.

This bond is one of the series of bonds described in the within mentioned mortgage deed of trust executed by the .....Company to the undersigned as Trustee.

..... TRUST COMPANY, TRUSTEE,

By .....

PRESIDENT.

REGISTRATION.

No writing below, except by an officer of the Trustee.

Date of Registry. Owner's name and address. Registrar.

"RESOLVED FURTHER, that the Company, to secure the payment of all of said bonds and coupons equally and ratably with-

out priority or distinction, make, execute, acknowledge, and deliver a mortgage deed of trust, dated....., ..., to the.....Trust Company of....., as Trustee, substantially in the form submitted to this meeting and with the provisions as to sinking fund, retirement of bonds, and exchange of bonds for stock therein contained, and

"RESOLVED FURTHER, that the president is hereby authorized to execute, acknowledge and deliver the said mortgage deed of trust on behalf of the Company, and the Secretary is hereby authorized to affix the seal of this Company thereto and to attest such execution; and the president and treasurer or either of them, are authorized to deliver to said Trustee the shares of capital stock covered by this mortgage pursuant to its terms."

AND WHEREAS, these presents and the form and provisions thereof are the same which were submitted to said Board of Directors at said meeting and have been unanimously authorized and approved by the foregoing votes, and all conditions necessary to authorize the execution and delivery hereof and the delivery of the shares of capital stock made subject to the lien of this indenture have been complied with:

NOW THEREFORE THIS INDENTURE WITNESSETH, that the Company, in consideration of the premises and of the sum of one dollar to it in hand paid by said Trustee, the receipt whereof is hereby acknowledged, and to secure the payment of the interest and principal of the bonds hereinbefore described, doth in pursuance of the foregoing power and authority and every other power and authority it hereto enabling, hereby give, grant, bargain, sell, convey, assign, transfer, set over and deliver unto said.....Trust Company, Trustee, and its successors in the office of Trustee hereby created: —

[Insert description of the property.]

TO HAVE AND TO HOLD the above described property unto the said party of the second part, Trustee as aforesaid, its successor and successors in said trust, and their assigns; IN TRUST, HOWEVER, under the terms hereof, for the equal pro rata benefit and security of the lawful holders and owners

of the bonds and coupons hereinbefore described without any preference of one bond over another by reason of priority of issue, or otherwise. For the further carrying into effect of this conveyance, the Company hereby appoints the Trustee and its successors in the trust, its attorneys in its name and behalf to ask, demand and receive payment and delivery of any and all property conveyed and assigned to the Trustee by this Indenture, or intended so to be, and to give effectual releases and discharges therefor.

ARTICLE I.

POSSESSION OF PROPERTY BEFORE DEFAULT.

Until a default by the Company, as defined in these presents, it shall be permitted to retain the possession of the mortgaged property and any property which may be substituted therefor, except any shares of stock, with the full right to manage, use and make profit from the same as fully and freely as if this indenture had not been made, and with the sole right to vote at stockholders' meetings and receive and enjoy all dividends and income as the general owner of the stocks deposited with the Trustee under this indenture for all purposes not inconsistent with the security hereby created and the provisions or purposes of this deed of trust.

The Company may also, in its discretion, open, develop and operate new mines, and, in the usual course of business, but not otherwise, without said Trustee's consent, sell or dispose of free from the lien of these presents, ores and minerals which it may from time to time remove from its mines.

ARTICLE II.

DEFEASANCE.

If the Company shall well and truly pay and discharge all the principal and interest of said bonds, at the times and in the manner therein specified, and shall well and truly do and perform all and every other of the matters and things on its part to be done and performed, and herein set forth, then and in such case, these presents shall become void, and the estate, right and title of said Trustee, hereby created, shall utterly

cease and determine, and it shall forthwith execute to the Company a good and sufficient release in law of this indenture and the charge hereby created, and shall restore and surrender up possession to the Company of any property of said Company which it may have in its possession and shall not have sold under and by virtue of this indenture. But otherwise, and until such payment and performance, this indenture shall be and remain in full force and effect.

ARTICLE III.

WARRANTY AND OTHER COVENANTS.

The Company covenants with the Trustee (a) that it has good title, full power and lawful authority to sell, transfer and convey the property hereby conveyed or transferred and that it will warrant and defend the same and every part thereof unto the said Trustee against the lawful claims of all and every person or persons claiming or to claim the same except that, while having possession of the property to which it is entitled to possession under the terms hereof, it will diligently preserve the rights and property of all kinds now, or hereafter, granted or transferred to the Trustee under the provisions hereof; that in using and operating its plants it will at times maintain and preserve the same, and every part thereof, together with the fixtures and appurtenances, in thorough repair, working order and condition, and fully supplied with motive power and equipments; (b) that, subject to the provisions of Article I, it will not use the mortgaged property, nor any portion thereof, in any way so as to materially impair the security created by these presents, nor will it permit waste thereof, nor attempt to remove or place beyond the reach of said Trustee any of said property, nor will it do or omit to do any act or thing whereby its property may become lost or become subject to forfeiture; that it will pay all valid taxes, assessments and public charges, of whatsoever nature, which may from time to time be levied upon it or its property, by any public authority whatsoever; and that it will keep the mortgaged property free from any liens or incumbrances which will, or may become, entitled to priority over this mortgage; (c) that it will duly and punctually

pay the principal and interest of every bond issued hereunder and secured hereby at the dates and the place and in the manner specified in such bonds or in the coupons thereto belonging, and will otherwise observe the terms and conditions of said bonds and coupons according to their tenor; (d) that it will at all times keep such insurance on the property hereby conveyed as shall be satisfactory to the Trustee, the policies to be deposited with and made payable in case of loss to the Trustee; and in case of loss, if the Company so requests in writing within sixty (60) days after loss, the Trustee, in case no default exists known to it, shall pay over to the Company at any time thereafter all or any part of the insurance money received for use in paying for renewals or repairs of the property destroyed or injured not exceeding the cost thereof as certified by the affidavit of the President and Treasurer of the Company that such renewals and repairs have been made and the cost thereof, but the Trustee shall not be responsible in any event for the payment over of the insurance money if made upon the foregoing affidavit; (e) that it will, from time to time, upon the request of the Trustee, execute and deliver to it such further conveyances, transfers and instruments in writing as the Trustee may deem advisable in order to confer upon the Trustee full legal title to any of the property subject to this indenture; and (f) will at all times on request furnish the Trustee a schedule showing with reasonable detail the items of property covered by the lien hereof.

The Company further covenants that it will not at any time insist upon, plead or in any manner whatsoever claim, or take the benefit of any stay, valuation or extension law now or hereafter in force, nor after any sale pursuant to any provisions herein contained or to any decree of court, claim or exercise any right under any statute enacted by any State to redeem the property so sold or any part thereof, and it hereby expressly waives all benefit and advantage of any such law or laws, and covenants that it will not hinder or impede the execution of any power herein granted to the Trustee, but that it will permit the execution of every such power as though no such law had been enacted.

The Company covenants that it will seasonably do all things necessary to establish and maintain the lien hereof and the rights of the Trustee hereunder and to make and to keep these presents valid and binding as a mortgage covering real and personal property, according to the laws of any State in which said property now is or hereafter may be situated.

ARTICLE IV.

SINKING FUND.

As a sinking fund for the payment of the indebtedness hereby secured, the Company covenants and agrees that it will pay or cause to be paid to the Trustee the sum of.....dollars on or before....., ...; the sum of..... dollars on or before....., ..., [etc.] in gold coin of the United States, of the present standard of weight and fineness, to be applied by the Trustee to the purchase and redemption of said bonds.

The method of applying the sinking fund to the redemption of said bonds shall be as follows: The Trustee for three weeks next succeeding the first day of.....in each of the years ....., shall by notice published twice in each week in a daily newspaper published in the City of ....., advertise that sealed proposals will be received at its office on or before the.....day of.....of such year, for the sale to it at the lowest price not exceeding par and a premium of five per cent. and accrued interest, of an amount of said bonds sufficient as nearly as may be to exhaust the amount of money in its sinking fund on the first day of..... of such year. The trustee may reject any or all proposals, and shall pay for the bonds specified in any accepted proposals on the first day of May in such year.

If an insufficient number of bonds be so offered for sale the Trustee shall forthwith proceed to call bonds by lot for redemption in the manner provided in Article VI. to an amount sufficient to absorb as nearly as may be the balance of the sinking fund not used in the purchase of offered bonds. If any bond so called shall not be presented for redemption on or before

the date fixed therefor, the same shall be excluded from and after the redemption date from participating in the lien and security afforded by these presents; but the Trustee, out of the sinking fund, shall set apart and hold to the credit of and for the payment of said bond a sum equal to the principal thereof with a premium of five per cent, and with accrued interest, and the holder shall look for payment only to the sum so held by the Trustee, which shall be paid by the Trustee to the holder upon the presentation and delivery to it of such bond, together with all coupons thereto belonging.

Bonds purchased or so redeemed by the Trustee as aforesaid shall be cancelled by the Trustee and retained by it and any bond called and redeemed by the Company shall be presented to the Trustee and similarly cancelled.

ARTICLE V.

DEFAULT.

In case the Company (a) shall fail to pay either the interest or the principal of any of the bonds secured by this mortgage according to the terms thereof, whether demand for such payment be made at the office of the Trustee on the day such interest or principal becomes due, or at any time thereafter, and such failure shall continue for sixty days; or (b) shall fail to make any payment to the Trustee for the purpose of a sinking fund, at the time and in the manner set forth in Article IV. hereof, and such failure shall continue for a period of sixty days; or (c) shall fail to perform any of the other covenants upon its part to be performed and herein contained, and such failure shall continue for a period of sixty days, then in each of the cases mentioned in clauses (a), (b) and (c), above, at once, upon the occurrence of any such default, the Trustee may, in his discretion, or upon the written request of the holders of a majority of the outstanding bonds secured by this mortgage, and upon being furnished with sufficient funds for that purpose, or indemnified to its reasonable satisfaction, shall proceed in one of the following methods:

(1) Cause any or all of the stock deposited with it hereunder to be transferred to its name as Trustee and thenceforth

in its discretion exercise the voting power thereof and retain the dividend payments and all other advantages arising therefrom and from all other securities in the possession of the Trustee under this mortgage, and may enter and take possession of all the property then subject to these presents, and thereupon said Trustee shall be entitled, without let or hindrance from the Company, and through such officers or agents as it may appoint, to hold, manage, enjoy and operate said mines and other property, and to receive the revenues, issues, tolls and profits thereof for the benefit of the bondholders, and to remove from the mines and sell minerals, and make needful repairs, alterations or improvements upon the mortgaged property, and in general to carry on and conduct the business heretofore carried on by the Company for the benefit of the bondholders, until such default shall have been made good or until all the bonds secured by these presents, if due and payable by their tenor or if duly declared to be due and payable before maturity, together with the interest thereon, shall have been paid in full, or until such time as said Trustee shall sell such mortgaged property as next herein below provided; or

(2) Either with or without previously taking possession of said property, sell the mortgaged and pledged property, in whole or in part, at public auction to the highest bidder or bidders, at such times and places as it may designate, upon such terms as to credits, partial credits and security for payment as it may think proper or expedient, having first given to the Company sixty days' notice in writing of the time, place and terms of sale and published such notice not less than three times a week for six consecutive weeks in one or more newspapers of general circulation published in....., and in one or more newspapers of general circulation published in ....., Massachusetts, and if such sale shall take place elsewhere than in either of said cities such notice shall also be similarly published in a daily newspaper in the place where said sale is to be held.

Said Trustee shall have the right to adjourn such sale or sales from time to time in its discretion, giving reasonable notice of such adjournment, and shall have the right to make suc-

cessive sales of portions of the mortgaged property remaining undisposed of at such sales. If the sale be in parcels, each purchaser shall take good title, notwithstanding that enough may have been already received to satisfy the debt hereunder. Said Trustee is further authorized and empowered, in case of sale as aforesaid, and is hereby constituted the attorney irrevocable of the Company, to execute and deliver in its own name, or in the name and under the seal of the Company, such deeds, bills of sale, or other instruments in writing, and to do such other acts and things as may be necessary and proper to vest in the purchaser or purchasers at such sale or sales, a valid title to the property so sold, free from any rights of redemption of the Company, the Company hereby ratifying and confirming every such act and deed as said Trustee, either in its own name or as such attorney, shall lawfully do in the premises. Such sale or sales shall be a perpetual bar both at law and in equity against the Company, and all persons or corporations claiming by, through or under it.

As affecting the title to any property purchased at any such sale, the facts set forth in any affidavit made by the President or Secretary of the Trustee and appended to the deed of conveyance, relating to the existence of any default or to the time and manner of giving any notice hereby required, shall not be open to contradiction by any party, but shall conclusively be deemed to be true.

At any sale or sales, whether made under the power of sale herein contained, or in pursuance of any foreclosure proceedings instituted by said Trustee, it shall be lawful for said Trustee, or for any one or more of the bondholders, to purchase any portion or all of the property so sold; and the purchaser at any such sale, except said Trustee, shall not be responsible for the application of the purchase money.

In case of any sale hereunder, any purchaser, for the purpose of making settlement or payment for the property purchased, shall be entitled to use and apply any bonds hereby secured and theretofore issued and outstanding with their matured and unpaid coupons, by presenting such bonds and coupons, in order that there may be credited thereon the sums ap-

plicable to the payment thereof out of the net proceeds of such sale to the owner of such bonds and coupons, as his ratable share of such net proceeds, after making any deductions which may be made from the proceeds of sale for costs, expenses, compensation and other charges, and thereupon such purchaser shall be credited on account of such purchase price payable by him, with the sums applicable out of such net proceeds to the payment of and credited on the bonds and coupons so presented.

(3) Either with or without taking possession of the property, proceed to enforce and protect its rights and the rights of the bondholders under this indenture by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement herein contained or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the performance of any other appropriate legal or equitable remedy as the Trustee shall deem most effectual to protect and enforce the rights aforesaid, and in any such suit the Trustee shall be entitled as of right to the appointment of a receiver who shall be entitled to the immediate possession of all the proprty covered by this mortgage, including all the shares or other securities deposited hereunder, and all dividends, rights and interests arising therefrom or pertaining thereto.

In case the Company shall make default in any of the respects mentioned in this article, and at any time during the continuance of such default there shall be existing any judgment against the Company unsatisfied and unsecured by bond on appeal; or in case the Company shall make any assignment for the benefit of its creditors; or in case in any judicial proceding by any person other than the Trustee, a receiver, assignee or trustee in bankruptcy of the Company, shall be appointed or a judgment or order entered for the sequestration of its property; or its property shall be seized under any writ of attachment or other legal process, or by a mortgagee or other person having a lien thereon, and it shall not as soon as and in such manner as may be permitted by law cause said property to be released therefrom by giving bond or otherwise, the Trustee shall be entitled forthwith to exercise the right of entry herein conferred and provided to be exercised by the Trustee

upon the occurrence and continuance of default as hereinbefore provided, without awaiting said prescribed default period; and this entry may be made as a part of the proceedings for sale, or the proceedings for foreclosure in the Courts, and in such case the Trustee shall not be called upon, or obliged against its will, to manage and work the property further than may be necessary for the protection of the bondholders, as aforesaid, but its duty shall be satisfied by simply performing such acts as may be necessary for the immediate protection of the rights of the bondholders, and the possession of the property shall be required to be held by said Trustee only so long and so far as may be essential for this purpose, and may be relinquished by the Trustee when such purpose has been accomplished, by transferring said property to a receiver, if appointed, or by the sale of the same, or otherwise, in the discretion of the Trustee.

In case of any default by the Company, continued for the prescribed default period as hereinbefore provided, it shall be the right of the Trustee and its duty if requested by the holders of not less than a majority of the outstanding bonds to declare the principal of all outstanding bonds to be due and payable, whether the same are then due according to their terms or not, and the same shall thereupon be and become at once due and payable.

The proceeds received by the Trustee from any sale or sales under the provisions hereof, in whatever manner or proceeding the mortgage shall be foreclosed, shall be applied: —

(1.) To the reimbursement of the Trustee for all costs, charges and expenses incurred by it in connection with the management and operation of the mortgaged property, or in connection with said sale (including a reasonable compensation to the Trustee for its own services), and for any other charges which are, or may become, due in respect to the mortgaged property up to the date of sale, the non-payment of which would subject any portion of the property covered by this mortgage to any forfeiture or to any liens of priority over these presents; and

(2.) To the payment of the principal of such of the bonds secured by this mortgage as may at that time be unpaid,

whether the same shall have previously become due or not, and any unpaid interest which shall at that time have accrued on said bonds, and (in case of distribution between two successive coupon days) by a just proportional part of the several coupons then next maturing, without discrimination or preference, but ratably to the aggregate of said unpaid bonds and accrued and unpaid interest added together; and

(3.) After the satisfaction of all the bonds secured hereby and interest thereon, the surplus, if any, shall be paid over by said Trustee to the Company.

The powers conferred upon the Trustee by this article are not in substitution for such remedies, by way of foreclosure or otherwise, as may be conferred upon mortgagees or pledgees by the laws of....., or by the laws of any State or country where the mortgaged property may be, but are in addition thereto.

Any notice to the Company required to be given by these presents may be given to or made upon either the president or the treasurer or any two directors of the Company, and when so given shall be binding.

ARTICLE VI.

CALLING OF BONDS.

In addition to the redemption of said bonds to the amount and at the times herein provided, the Company shall have the right at its option to call all or any bonds of this issue on any interest day until their maturity, at par with a premium of five per cent. and accrued interest to said date. In case such option is exercised the following provisions shall apply: —

There shall be drawn by lot by the Trustee on the first days of.....and.....such an amount of said bonds as the Company desires to call. The Trustee shall advertise the numbers of the bonds so drawn in a daily newspaper published in the City of.....once a wek for three consecutive weeks, the last publication to be thirty days at least prior to the first day of.....or.....then next ensuing, and a notice that interest on said bonds will cease on

the next ensuing interest day and requiring the same to be presented at its office for payment. If any bonds so drawn be registered on the transfer registry a similar notice shall be sent to the registered holder at his registered address. Bonds when drawn shall cease to be exchangeable for stock, and interest on such bonds shall cease on the interest day then next ensuing, provided that funds to pay the same are deposited with the Trustee as hereinafter provided, and upon that date said bonds so drawn shall be presented to the Trustee for payment, and upon surrender thereof, with all unmatured coupons, shall be paid at par with a premium of five per cent. and accrued interest to said date. The Company shall, prior to any interest day on which bonds called, as hereinbefore provided, are to be presented for payment, pay to the Trustee such sum as will be needed to make such payment.

It is further expresly understood and agreed that, if after any bond has been called for payment in accordance with the foregoing provisions, the same shall not be presented to the Trustee for redemption on or before the day fixed therefor in the published notice, the Company may deposit with the Trustee to the credit of such bond, designated by the number thereof, the sum of One Thousand and Fifty Dollars ($1,050) together with a sum equal to the interest accrued on the bond up to the date fixed for redemption as aforesaid and remaining unpaid, which deposit shall be full payment of the bond and coupons belonging thereto, as between the Company and the holder thereof. Thereupon and thereafterwards, such bond and the coupons thereto belonging shall be excluded from participating in the lien and security afforded by these presents; and the holder shall look for the payment of the bond and accrued interest only to the sum so deposited in the hands of the Trustee, and in no event to the Company; but said sums so deposited shall be held by the Trustee to the credit of and for the payment of said bond, and shall be paid by the Trustee to the holder thereof upon the presentation and delivery to it of such bond, together with all coupons thereto belonging. And upon the presentation and payment of the entire issue of bonds and coupons which at the time shall have been issued and out-

standing, or upon the presentation of a portion thereof cancelled (all of said bonds having been paid or duly called for payment), and the deposit by the Company with the Trustee of a sum of money sufficient, together with all amounts in the hands of the Trustee applicable to the payment and redemption of bonds, to pay at the rate aforesaid all of said bonds and interest that are not presented to the Trustee in accordance with the call therefor, and the lawful charges of the Trustee, the Trustee shall cancel and satisfy of record this mortgage or deed of trust as fully and to the same effect as if the total issue of said bonds and coupons had been duly paid by the Company at the maturity thereof.

ARTICLE VII.

SUBSTITUTION OF PROPERTY.

The Trustee shall have full power in its discretion to release from the lien of this indenture, any structures or lands (exclusive of mines and mineral lands) which shall not in its judgment be necessary for further use in connection with the said mines or mining property; provided, however, that such property is replaced by other property of equal value which shall be subject to the terms of this indenture or its proceeds applied to the improvement of the mortgaged property or to the payment of the indebtedness secured hereby. It is distinctly understood, however, that the Trustee shall have no right, power or discretion under this paragraph to release any of the mines or mineral lands covered by this indenture.

The Company shall have full power in its discretion from time to time to dispose of free from the lien of this indenture any of the implements, machinery, tools, appliances, furniture, fixtures or other like personal property embraced within this indenture which may have become unfit for use, replacing the same by, or substituting for the same, similar property of equal or greater value which shall become subject to the first lien of this indenture.

The Company shall also have the right, with the approval of the Trustee, to rebuild or alter any building or structures on the mortgaged premises.

The Trustee shall have the right, as a condition of its assent to any sale, exchange or other disposition of property, rebuilding or alteration, under the terms of this article, to exact such conditions as it may deem desirable in order to secure a compliance by the Company with the above provisions.

It is further expressly covenanted and agreed that it shall be lawful for the Company, with the consent and approval in writing of the Trustee, to consolidate the said shares of capital stock hereby transferred upon such terms, or, with like consent, to make such other changes in, to sell, or otherwise dispose of the same, as may appear to the Company to be advisable; provided, however, that the stock, or proceeds of the stock, resulting from any such sale or other disposition of said shares of capital stock shall be delivered to the Trustee to be held by it subject to the trusts hereby declared of said shares of capital stock, in this indenture described.

And the Company may, with the like approval of the Trustee, acquire the actual ownership and possession of the property, franchises and estate of the.....Company, or the.....Company, or both, in whole or part, subject, nevertheless, to a like lien and charge thereon as is herein created upon the said stocks and other securities of said companies hereinbefore mentioned, for the security of said bonds, and make, do, accept, execute and deliver all such consolidations, amalgamations, unions, purchases, grants, leases, contracts and other agreements as may be necessary for that purpose; and if the Company shall convey, assign, transfer to and deliver to the Trustee the property of such companies, or either of them, by good and valid instruments, acts and assurances to be held upon the trusts and conditions herein declared, the respective stocks and other securities may be surrendered by the Trustee; provided, always, that the lien and charge to be created shall not be less than or inferior in order of priority to the lien and charge hereby created on said stocks and securities, and if the assets and property of either or both of said companies shall be acquired by the mortgagor in this instrument and subjected to the lien of these presents the said companies or either of them may be duly dissolved. On the

other hand, if default shall occur hereunder and continue sixty days as aforesaid, it shall be lawful for the Trustee to have any or all shares of stock then held hereunder as collateral transferred into its own name or into such names as it may deem wise and proper, and thereafter to exercise as to such shares as full rights and powers as if it were the sole beneficial owner thereof, being governed by what shall seem to it, the Trustee, to be for the best interests of the bondholders.

ARTICLE VIII.

RIGHTS OF BONDHOLDERS.

The holders of three-fourths in amount of the bonds issued and outstanding at any time shall have the right to control the action of the Trustee in enforcing, pursuant to the terms thereof, any of the provisions of this indenture; to direct the Trustee to waive any default which may occur in the performance of any of the covenants or conditions herein contained; to direct the Trustee to discontinue any proceedings which it may have taken to foreclose this mortgage or to enforce in any way the provisions thereof; and to direct the Trustee to restore to the Company any and all property of which the Trustee shall have taken possession under the terms hereof by reason of any default; and such directions shall be binding upon the Trustee, if sufficient indemnity be furnished it.

Provided always that no such action on the part of the bondholders shall extend to or be taken to affect any subsequent default or impair the rights resulting therefrom, or to extend to a default in the payment of the principal of the bonds secured as they become payable.

No delay or omission of the Trustee, or of any holders of bonds hereby secured, to exercise any right or power accruing upon any default continuing as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default or acquiescence therein; and every power and remedy given by this article to the Trustee or the bondholders may be exercised from time to time, and as often as may be deemed expedient by the Trustee or by the bondholders.

ARTICLE IX.

REMOVAL AND APPOINTMENT OF TRUSTEE.

Any Trustee hereunder may resign the office of Trustee at any time by a written resignation delivered to the Company, and any Trustee may be removed at any time by an instrument or concurrent instruments in writing, signed by the holders of not less than two-thirds in amount of the bonds hereby secured and then outstanding. In case at any time the Trustee, or any Trustee hereafter appointed, shall resign, or shall be removed, or otherwise become incapable of acting, a successor may be appointed by the holders of two-thirds in amount of the bonds hereby secured then outstanding, by an instrument or concurrent instruments, signed by such bondholders or their attorneys in fact, duly authorized; provided, nevertheless, in case at any time there shall be a vacancy in the office of Trustee hereunder, the Company, by an instrument executed by order of its board of directors, may appoint a Trustee to fill such vacancy until a new Trustee shall be appointed by the bondholders as herein authorized. The Company shall forthwith publish notice of such appointment by it made once in each week for three successive weeks in a daily paper published in the City of....., Massachusetts, and any Trustee so appointed shall immediately, and without further act, be superseded by a Trustee appointed by the bondholders, in the manner above provided. Every such Trustee appointed by the bondholders or by the Company shall always be a trust company in good standing, if there be such a trust company willing and able to accept the trust, upon reasonable or customary terms.

Any new Trustee appointed hereunder shall execute, acknowledge and deliver to the Trustee last in office, and also to the Company, an instrument accepting such appointment hereunder, and thereupon such Trustee, without any further act, deed or conveyance, shall become vested with all the estates, properties, rights, powers, trusts, duties and obligations of its predecessor in trust hereunder, with like effect as if originally named as Trustee herein; but the Trustee ceasing to act shall, nevertheless, on the written request of the Company, or of the new Trustee, execute and deliver an instrument transferring

to such new Trustee, upon the trusts herein expressed, all the estates, properties, rights, powers and trusts of the Trustee so ceasing to act, and shall duly assign, transfer and deliver all properties and moneys held by such Trustee to the new Trustee. Should any deed, conveyance or instrument in writing from the Company be required by any new Trustee for more fully and certainly vesting in and confirming to such new Trustee such estate, rights, powers and duties, any and all such deeds, conveyances and instruments in writing shall, upon request, be made, executed, acknowledged and delivered by it.

ARTICLE X.

RIGHTS AND DUTIES OF TRUSTEE.

The Trustee for itself and its successors hereby accepts the trust and assumes the duties herein created and imposed upon it, but only upon the following terms and conditions, to wit:

(a) Before proceeding to take possession of the mortgaged property or to foreclose this mortgage deed as provided in Article V, whether the foreclosure be made by sale under the power contained therein or otherwise, the Trustee shall have the right first to require from the bondholders reasonable indemnity against loss and liability that may be incurred by it in so doing. All instructions or requests by bondholders to the Trustee shall be in writing, and the Trustee shall not be bound to recognize any person or party as a holder of any of said bonds, nor to take any action at his request, unless his bonds are submitted for its inspection or his ownership thereof is otherwise shown to its satisfaction; and it may, if it so desires, require the bonds so submitted to be deposited with it and retained until it shall have completed the action requested by such bondholders. No bondholder or bondholders shall take any proceedings to enforce the provisions hereof until after he or they shall have requested the Trustee in writing to take such proceeding, and tendered due indemnity therefor and the Trustee shall have refused or neglected to take some suitable action.

(b) The Trustee may select and employ in and about the execution of this trust suitable agents and attorneys whose

reasonable compensation shall be paid to the Trustee by the Company, or in default of such payment shall be a charge upon the premises, property, and stock hereby pledged and the proceeds thereof paramount to said bonds.

(c) Said Trustee, until called upon to take active measure to enforce security, by foreclosure or otherwise, with due indemnity, shall be in no way responsible for insurance, taxes or repairs, or any other matter affecting the security.

(d) The Trustee shall have a first lien upon the pledged property and funds for its reasonable expenses, counsel fees, and compensation incurred in and about the execution of the trust hereby created and the exercise and performance of its powers and duties hereunder.

(e) The Trustee shall not be held liable for any failure of title in the premises hereby conveyed, nor for any recitals of fact contained in this instrument, the same being recitals of the mortgagor and not of the Trustee, nor for the sufficiency of this instrument or the security herein provided.

ARTICLE XI.

BONDS.

After certification the Trustee shall deliver all the bonds to the treasurer of the Company. Only such bonds as shall bear thereon the certificate of the Trustee shall be secured by this indenture or entitled to any lien or benefit hereunder.

IN WITNESS WHEREOF, the said parties have caused four counterparts of these presents to be subscribed by their respective presidents and have caused their respective corporate seals to be affixed thereto, and the execution thereof to be attested by their secretaries, the day and year as above written.

Signed, sealed and delivered in the presence of }

.....COMPANY,

By

.....

Attest: *President.*

.....

Secretary.

.....TRUST COMPANY,
By
.....
Attest: *President.*
.....
Secretary.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, ss.

On the.....day of....., A. D. ...., personally appeared before me..... and.....who being by me duly sworn did say that they are respectively the President and the Secretary of the.....Company, and that said instrument was signed in behalf of the said corporation by resolution of its board of directors, and they acknowledged to me that said corporation executed the same; and on the same day personally appeared before me..... .....and.....who being by me duly sworn did say that they are respectively the President and Secretary of the.....Trust Company, the Trustee above named, and that said instrument was signed in behalf of said corporation by resolution of its board of directors, and they acknowledged to me that said corporation executed the same.

.....
Notary Public.

My Commission Expires
.....

COMMONWEALTH OF MASSACHUSETTS.[1]

COUNTY OF SUFFOLK, ss.

On the.....day of....., A. D. ...., personally appeared..... and.....known to me to be respectively the President and the Secretary of the

[1] Required by the laws of some Western States.

.....Company and also
..... and .....
.....personally known to me to be respectively the President and the Secretary of the.....Trust Company, and all of said persons having been duly sworn by me did say that the above mortgage is made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of the said.....
.....Company, the mortgagor.

.....

Notary Public.

My Commission Expires

.....

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